THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

MARY LOU LONG,
Grievant,

v. **Docket No. 2009-0933-MAPS**

DIVISION OF VETERAN'S AFFAIRS and
DIVISION OF PERSONNEL,
Respondents.

ORDER DENYING DEFAULT AND REMANDING TO LEVEL ONE

Mary Lou Long, Grievant, filed a written notice of default against her employer, Division of Veteran's Affairs, on November 3, 2009. Grievant asserts through her representative that she is moving "for entry of default judgement granting her grievance due to Respondent's failure to conduct a Level I hearing."

A hearing was held on the issue of default at the Westover office of the West Virginia Public Employees Grievance Board before the undersigned Administrative Law Judge on March 26, 2010. Grievant did not appear in person but appeared by her representative, Gordon Simmons, UE Local 170 WV Public Workers Union. Respondent appeared by its counsel, Nicole A. Cofer, Assistant Attorney General. Division of Personnel did not make an appearance. The matter became mature for consideration at the conclusion of the hearing addressing the request for default.

Synopsis

Grievant filed this grievance on January 16, 2009, requesting that it proceed directly to level three. By Order entered on February 18, 2009, this grievance was dismissed from the level three docket and transferred to the level one docket for scheduling a conference or a hearing. Respondent then attempted to schedule a level one conference or hearing

to address the grievance, but Grievant refused to respond to the scheduling request and claimed default. Grievant resigned from her position of employment prior to filing the grievance. Respondent demonstrated that the delay in scheduling the level one hearing or conference was the result of "a justified delay not caused by negligence or intent to delay the grievance process." W. VA. CODE § 6C-2-3(b)(1). Accordingly, the request to enforce the grievance by default is denied.

The following findings of fact are based upon a thorough review of the record.

Findings of Fact

1. On January 16, 2009, Grievant initiated a grievance protesting alleged harassment over a request for emergency family leave. Grievant requested this grievance proceed directly to level three.

2. By Order entered on February 18, 2009, this grievance was dismissed from the level three docket and transferred to the level one docket for scheduling a conference or a hearing.

3. Grievant resigned her position at some point between the request for emergency family leave for the dates of January 3rd and 4th and before filing this grievance.

4. Respondent utilizes the services of Mike Lyons, Deputy Director for Respondent, as its designee to conduct level one hearings and conferences. Mr. Lyons is based in Charleston, West Virginia and travels from his office location to the various areas in the state he is called upon to conduct hearings and conferences.

5. Mr. Lyons attempted to contact Grievant on numerous occasions by telephone in order to schedule a level one hearing or conference. This is evidenced by letter dated March 30, 2009, from Mr. Lyons to Grievant. Respondent's Exhibit 1.

6. The record does not establish that Grievant responded to any of the requests to schedule the matter.

7. The grievance form indicates a request for a hearing; however, a level one hearing was not conducted within the statutory time frames. Respondent acknowledges this fact but asserts a statutory excuse for not responding within the time required.

Discussion

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. *Browning 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 resolved are whether a default has occurred and whether the employer has a statutory excuse for not responding within the time required by law. *Dunlap v. Dep't of Envtl. Protection*, Docket No. 2008-0808-DEP (Dec. 8, 2008).

The term "response," as used in the default provision, not only refers to the obligation to render decisions within the statutory time limits, but to the holding of conferences and hearings within proper limits as well. *Hanlon v. Logan County Bd. of*

Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997). Therefore, Grievant may seek relief for default based upon the failure to hold a hearing with the time period mandated by statute.

If default occurs, Grievant prevails, and is entitled to the relief requested, unless Respondent is able to state a defense to the default or demonstrate the remedy requested is either contrary to law or contrary to proper and available remedies. W. VA. CODE § 6C-2-3(b)(2). If Respondent demonstrates that a default has not occurred because it was prevented from meeting the time lines for one of the reasons listed in W. VA. CODE § 6C-2-3(b)(1), Grievant is not entitled to relief. If there is no default or the default is excused, the grievance will be remanded to the appropriate level of the grievance process.

There is no dispute in this grievance that Respondent did not conduct a conference or hearing at level one within the applicable statutory time lines after receiving the Order transferring this case to level one from level three. The controlling issue is whether Respondent has demonstrated by a preponderance of the evidence a statutory defense for the failure to hold the conference or hearing in the time allowed. The statute allows the employer to escape default if it can be proven that the chief administrator or designee was prevented from making a timely response for one of three reasons: "injury, illness or a justified delay not caused by negligence or intent to delay the grievance process."[1] Respondent argues that the failure to hold a conference or a hearing at level one was the result of justified delay. The undersigned agrees.

The record of this grievance establishes that Respondent made numerous attempts by phone contact to schedule a level one conference or hearing and that no response was

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[1]W. VA. CODE § 6C-2-3(b)(1).

received from Grievant. After many failed attempts to reach Grievant by phone, Respondent sent a letter dated March 30, 2009, to Grievant as another good faith attempt to schedule a conference or hearing. Respondent did not receive any communication from Grievant regarding this matter until receipt of Grievant's request for default dated November 2, 2009.[2] The undersigned finds that, under the circumstances presented, Grievant is not entitled to relief by default. Respondent made numerous efforts to comply with the requirements of the applicable grievance procedure. If a level one conference or hearing did not occur the undersigned finds that Grievant was the cause of the failure to conduct such a proceeding. Accordingly, this matter will be remanded to level one for a conference or hearing.

The following conclusions of law are appropriate in this matter.

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

2. "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

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[2]Respondent also raised with the undersigned the affirmative defense that this request for default was not made by Grievant "within ten days of the default." W. VA. CODE § 6C-2-3(b)(2).

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 resolved are whether a default has occurred and whether the employer has a statutory excuse for not responding within the time required by law. *Dunlap v. Dep't of Envtl. Protection*, Docket No. 2008-0808-DEP (Dec. 8, 2008).

3. Respondent has proven, by a preponderance of the evidence, that the failure to schedule the level one conference or hearing within the time required by the statute was the result of a justified delay not caused by negligence or intent to delay the grievance process and no default can be found.

Accordingly, the request for default is **DENIED**. This grievance is **REMANDED** to level one for a conference or a hearing before the chief administrator or designee.

Date: April 12, 2010

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Ronald L. Reece
Administrative Law Judge