THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DALLAS D. BRANCH, JR.,
Grievant,

v. **DOCKET NO. 2010-0793-WVU**

WEST VIRGINIA UNIVERSITY,
Respondent.

ORDER DENYING DEFAULT

Dallas D. Branch, Jr., Grievant, filed a claim of default with the Grievance Board against his employer, West Virginia University, on January 11, 2010, alleging a default had occurred at level one of the grievance procedure. A hearing was held on February 24, 2010, before the undersigned Administrative Law Judge, for the purpose of taking evidence on the issue of whether a default had occurred. Grievant appeared *pro se*, and Respondent was represented by Samuel R. Spatafore, Assistant Attorney General. This matter became mature for decision upon receipt of the last of the parties' written arguments, on March 11, 2010.

Synopsis

Grievant argued a default occurred when he did not receive notice of a level one hearing within ten days of the date the grievance was filed. The chief administrator determined that this matter should be dismissed at level one because there was no grievable event, and a hearing was not needed. Respondent was not required to send Grievant notice of a hearing when one was not going to be held.

The following Findings of Fact are made based upon the record developed at the default hearing.

Findings of Fact

1. Grievant is employed by West Virginia University ("WVU").

2. On December 15, 2009, Grievant filed a grievance against WVU, which was received by WVU on December 17, 2009. The grievance form indicated that a hearing was requested.

3. WVU was officially closed for the holidays on December 24, 25, 28, 30, and 31, 2009, and January 1, 2010, and one-half day on December 23, 2009.

4. January 15, 2010, was the fifteenth working day after the grievance was received by WVU.

5. On December 23, 2009, Respondent filed a Motion to Dismiss the grievance at level one.

6. On December 29, 2009, Respondent filed with the Grievance Board to consolidate this grievance with another grievance filed by Grievant, Docket No. 2009-1391-WVU, which grievance is pending at level three.

7. On January 7, 2010, the undersigned Administrative Law Judge issued an Order denying the Motion to Consolidate the two grievances.

8. On January 12, 2010, Sue Keller, Chief Grievance Evaluator, issued a Dismissal Order, dismissing this grievance at level one, finding there was no grievable event.

9. A level one hearing was never scheduled or held, and Grievant did not receive a Notice of Hearing at level one.

Discussion

A 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). When a grievant asserts that his employer is in default, the grievant must establish such default by a preponderance of the evidence. *Dunlap v. Dep't of Envtl. Protection*, Docket No. 2008-0808-DEP (Dec. 8, 2008); *Harless v. W. Va. State Police*, Docket No. 07-WVSP-080D (Mar. 21, 2008). 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).

W. VA. CODE § 6C-2-4(a)(3) states:

> (3) Level one hearing. -- The chief administrator shall hold a level one hearing within fifteen days of receiving the grievance. A level one hearing is a recorded proceeding conducted in private in which the grievant is entitled to be heard and to present evidence; the formal rules of evidence and procedure do not apply, but the parties are bound by the rules of privilege recognized by law . The parties may present and cross-examine witnesses and produce documents, but the number of witnesses, motions and other procedural matters may be limited by the chief administrator. The chief administrator shall issue a written decision within fifteen days of the level one hearing.

"'Days' means working days exclusive of Saturday, Sunday, official holidays and [a]ny day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided for by statute, rule, policy or practice." W. VA. CODE § 6C-3-2(c).

There is no question that the Dismissal Order was issued at level one within 15 working days of the date the grievance was filed. Grievant's argument is that a default occurred when he did not receive notice of a level one hearing within 10 days of filing his grievance.

W. VA. CODE § 6C-3-3(l) requires, with regard to notice of a hearing, that:

> Reasonable notice of a proceeding shall be sent at least five days prior to the proceeding to all parties and their representatives and shall include the date, time and place of the proceeding.

In this case no hearing was ever scheduled or held because the grievance was dismissed at level one without a hearing. Respondent was not required to give Grievant notice of the hearing, because there was not going to be a hearing.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. When a grievant asserts that his employer is in default, the grievant must establish such default by a preponderance of the evidence. *Dunlap v. Dep't of Envtl. Protection*, Docket No. 2008-0808-DEP (Dec. 8, 2008); *Harless v. W. Va. State Police*, Docket No. 07-WVSP-080D (Mar. 21, 2008). 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).

2. A level one hearing must be held fifteen working days of the date the grievance was filed.

3. No level one hearing was required, nor was notice of a hearing required, because the grievance was dismissed.

Accordingly, Grievant's request for judgment by default is **DENIED.** As Grievant has already appealed to level two, requesting private arbitration, Grievant has ten days from receipt of this Order to advise the Grievance Board as to whether he and Respondent have agreed to private arbitration, and if not, how he wishes to proceed.

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BRENDA L. GOULD
Administrative Law Judge

Date: April 5, 2010