WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

BARBARA KOBLINSKY,

Grievant,

v. **Docket No. 2011-1415-PutCH**

PUTNAM COUNTY HEALTH DEPARTMENT,

Respondent.

ORDER DENYING DEFAULT AND GRANTING
RESPONDENT'S MOTION TO CONSOLIDATE

Barbara Koblinsky ("Grievant"), by and through her Representative, filed a "Motion for Default Judgement (sic)" with the West Virginia Public Employees Grievance Board on May 2, 2011, alleging that her employer, Respondent Putnam County Health Department ("Respondent"), defaulted at Level One of the grievance procedure. A hearing was held on June 24, 2011, before the undersigned administrative law judge, for the purpose of taking evidence on the issue of whether a default had occurred. Grievant appeared in person and by her representative, Gordon Simmons, steward, UE Local 170 West Virginia Public Workers Union, and Respondent appeared by counsel, Robert A. Hogue, Esquire, Miller, Weiler, & Walters. Also appearing was Jacqueline Fleshman, Respondent's representative. This matter became mature for decision upon receipt of the last of the parties' proposed Findings of Fact and Conclusions of Law on July 25, 2011.

Synopsis

Grievant filed this grievance on April 1, 2011, requesting a hearing at Level One. On April 21, 2011, Respondent, by its Administrator, Jacqueline Fleshman, scheduled the Level One hearing to be held on April 22, 2011. On that same day, the Administrator

learned that Grievant's supervisor would not be available to appear on April 22, 2011. Also on this date, Grievant's Representative advised Respondent's Administrator, by email, that neither he nor the Grievant would be available to appear on the scheduled date. Respondent's Administrator emailed Grievant's Representative that same day requesting his and Grievant's available dates near the beginning of May. Grievant's Representative failed to respond to this email communication. On May 2, 2011, Respondent's Administrator scheduled the Level One hearing to be conducted on May 11, 2011, and notified Grievant's Representative of the same by email. On May 2, 2011, Grievant, by her Representative, filed a "Motion for Default Judgement (sic)" which read as follows: "In the above-styled matter, Grievant by representative moves for entry of default judgement (sic) granting his (sic) grievance."[1]

Respondent originally scheduled the Level One hearing within the fifteen-day time frame as required by law. This hearing had to be rescheduled because Grievant, Grievant's Representative, and Grievant's Supervisor were unavailable on the selected date. Respondent was then prevented from scheduling the Level One hearing within the fifteen-day time frame because of Grievant's supervisor's illness. Respondent acted in good faith to schedule the Level One hearing within the time frame established by law. Respondent did not intentionally delay, or hinder, the grievance process. Further, Grievant contributed to the delay in scheduling the Level One hearing when Grievant's

[1] As written, Grievant's "Motion for Default Judgement (sic)" violates 156 C.S.R. 1 § 6.6 because it fails to state any legal or factual basis for the motion. The undersigned noted the motion's deficiencies during the June 24, 2011 hearing in this matter. However, this violation alone is not sufficient grounds for denying the Motion for Default as Respondent has requested.

Representative failed to respond to Respondent's April 21, 2011 scheduling email. Accordingly, the request for default judgment is denied.

The following findings of fact are based upon the limited record of this grievance:

Findings of Fact

1. At all times relevant herein, Grievant was employed as a Sanitarian by the Putnam County Health Department.

2. On April 1, 2011, Grievant filed this grievance alleging that Respondent placed her on leave restriction without good cause.

3. Respondent received the Statement of Grievance on April 4, 2011.

4. On April 21, 2011, Jacqueline R. Fleshman, Respondent's Administrator, scheduled the Level One hearing to be conducted on April 22, 2011, at 10:30 a.m. Ms. Fleshman notified Grievant's Representative and Grievant's supervisor, Carey Eden, of the Level One hearing by email on April 21, 2011.

5. In response to Fleshman's email, on April 21, 2011, Grievant's Representative informed Fleshman by email that he and the Grievant were not available on April 22, 2011. By a separate email to Fleshman that same date, Ms. Eden requested that the April 22, 2011 Level One hearing be "moved" to the following week because she was off work, under a doctor's care, and had not been released to return to work. Eden did not include Grievant's Representative in her email to Fleshman.

6. Upon learning the Grievant and her Representative would not be available on April 22, 2011, for the Level One hearing, and that Ms. Eden had requested the hearing date be "moved" to the beginning of May 2011, because she had not been released to return to work, Fleshman emailed Grievant's Representative again on April 21, 2011 asking

for a list of available dates in the beginning of May.

7. Fleshman did not attempt to schedule the Level One hearing before April 21, 2011, because she was trying to wait until Ms. Eden returned to work.

8. Fleshman did not seek or receive from Grievant a waiver of the applicable time lines for scheduling the Level One hearing.

9. Grievant's Representative never responded to Fleshman's April 21, 2011 email in which she requested Grievant's and his available dates near the beginning of May 2011 in an attempt to schedule the Level One hearing.

10. Having received no response from Grievant's Representative to her last April 21, 2011 email, by email sent to Grievant's Representative and Carey Eden on May 2, 2011, Fleshman scheduled the Level One hearing to be held on May 11, 2011, at 9:00 a.m.

11. Grievant's Representative filed his "Motion for Default Judgement (sic) on May 2, 2011, which stated as follows: "[i]n the above-styled matter, Grievant by representative moves for entry of a default judgement (sic) granting this grievance."

12. This motion failed to set forth any statement of its basis, either legal or factual.

Discussion

When a grievant asserts that his employer has failed to respond to the grievance in a timely manner, resulting in a 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); W. VA. CODE § 6C-2-3(b). 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). Further, West Virginia Code § 6C-2-3(b)(2) provides the employer another defense to the default by "showing that the remedy requested by the prevailing grievant is 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 if the default is excused, the grievance will be remanded to the appropriate level of the grievance process.

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). A Level One hearing must be held within fifteen working days of the date the grievance was *received* by the chief administrator. *See,* W. VA. CODE § 6C-2-4(a)(3); W. VA. § 6C-2-2(c). Therefore, Grievant may seek relief for default based upon the failure to hold a hearing within the time period mandated by statute.

"The grievance process is intended to be a fair, expeditious, and simple procedure, and not a procedural 'quagmire.'" *Harmon v. Fayette County Bd. of Educ.,* Docket No. 98-10-111 (July 9, 1998), citing *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 393 S.E.2d 739 (1990), and *Duruttya v. Bd. of Educ.*, 181 W. Va. 203, 382 S.E.2d 40 (1989).

See Watts v. Lincoln County Bd. of Educ., Docket No. 98-22-375 (Jan. 22, 1999). As stated in *Duruttya, supra*, "the grievance process is for "resolving problems at the lowest possible administrative level." Additionally, *Spahr, supra*, indicates the merits of the case are not to be forgotten. *Id*. at 743. *See, Edwards v. Mingo County Bd. of Educ.*, Docket No. 95-29-472 (Mar. 19, 1996). Further, *Duruttya, supra*, noted that in the absence of bad faith, substantial compliance is deemed acceptable. Further, "[t]he grievance procedure should not become a trap for either the employees or employers, but rather it should work so that disputes are resolved consistently and fairly, as early as possible within the procedure." *Rutherford v. W. Va. Bureau for Emp. Programs*, Docket No. 03-BEP-040D (Mar. 24, 2003).

The Respondent *received* the Statement of Grievance on April 4, 2011. As such, the Level One hearing should have been held by April 25, 2011.[2] On April 21, 2011, Respondent, by Ms. Fleshman, initially scheduled the Level One hearing to be held on April 22, 2011. On April 21, 2011, Grievant's Representative emailed Fleshman that he and the Grievant were not available that day. Grievant's supervisor, Ms. Eden, who was off work and had not been released by her doctor to return, also informed Fleshman that she would not be able to attend the hearing scheduled for April 22, 2011, and asked that the hearing be moved to another date.[3] On April 21, 2011, Fleshman emailed Grievant's

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[2] It is noted that neither party raised any issues regarding the notice of grievance proceedings provisions of the Code.

[3] Grievant asserted at the June 24, 2011 hearing in this matter that Eden should have included Grievant's Representative on her email to Fleshman, and seemed to imply that there was wrongdoing of some kind on the part of the Respondent by failing to do so and/or by failing to inform Grievant's Representative of Eden's request. Grievant cited no law or rule to support her position. Eden would have been a potential witness at the Level

Representative requesting a list of his available dates near the beginning of May. However, Grievant's Representative never replied to this email. Further, Ms. Fleshman testified that although the Grievant was present during the time she was trying to schedule the Level One hearing, Grievant would not discuss this matter with her, instead referring Fleshman to speak with her representative. Grievant informing Fleshman to direct grievance-related communications to her representative is perfectly acceptable and proper under the rules; however, Grievant's Representative failed to communicate with Fleshman after April 21, 2011, except to file the Motion for Default.

The Level One hearing was originally scheduled within the fifteen-day time frame, as required by law. On May 2, 2011, the Level One hearing was rescheduled to May 11, 2011, a date beyond that time frame. However, Respondent was prevented from scheduling the Level One hearing within the fifteen-day time frame because Grievant's supervisor, Ms. Eden, who was needed for the Level One hearing, had not been released by her physician to return to work. Illness, such as this, is a defense to default specifically stated in West Virginia Code § 6C-2-3. *See*, W. Va. Code § 6C-2-3.

Further, from the evidence presented, Respondent acted in good faith and without the intent to delay, or hinder, the grievance process. Respondent waited many working days before attempting to schedule the Level One hearing in hopes that Grievant's supervisor would be able to return to work from medical leave. Grievant's Representative stopped communicating with Respondent on April 21, 2011, before the fifteen-day time

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One hearing. To the best of the undersigned's knowledge, no requirement exists in the applicable rules, statutes, and/or case law that would have required Fleshman or Eden to include Grievant's Representative in that email.

frame expired, and before the Level One hearing was rescheduled. By refusing to communicate with Respondent after April 21, 2011, Grievant/Grievant's Representative contributed to the delay in scheduling the Level One hearing. Further, as demonstrated by the filing of Grievant's Motion for Default on May 2, 2011, the very day Fleshman scheduled the Level One hearing to be held on May 11, 2011, it appears that Grievant was simply trying to win her grievance on a procedural technicality, regardless of its merits.

Under these circumstances, the undersigned finds that Grievant is not entitled to relief by default. Therefore, the Grievant's Motion for Default Judgement (sic) is denied. Grievant has pending before this Board another grievance, Docket No. 2011-1772-CONS. Respondent has moved this Board, in the event this grievance is permitted to continue, to consolidate it with Docket No. 2011-1772-CONS. Given the circumstances, and the subject matter of this grievance and that of the other pending grievance, Docket No. 2011-1772-CONS, the undersigned finds good cause to grant Respondent's Motion to Consolidate.

The following conclusions of law support the ruling in this grievance:

Conclusions of Law

1. When a grievant asserts that his employer has failed to respond to the grievance in a timely manner, resulting in a 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); W. VA. CODE § 6C-2-3(b).

2. 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). Further, West Virginia Code § 6C-2-3(b)(2) provides the employer another defense to the default by "showing that the remedy requested by the prevailing grievant is 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 if the default is excused, the grievance will be remanded to the appropriate level of the grievance process.

3. 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 within the time period mandated by statute.

4. A Level One hearing must be held within fifteen working days of the date the grievance was received by the chief administrator. *See,* W. VA. CODE § 6C-2-4(a)(3); W. VA. § 6C-2-2(c).

5. "The grievance process is intended to be a fair, expeditious, and simple procedure, and not a procedural 'quagmire.'" *Harmon v. Fayette County Bd. of Educ.,* Docket No. 98-10-111 (July 9, 1998), citing *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 393 S.E.2d 739 (1990), and *Duruttya v. Bd. of Educ.*, 181 W. Va. 203, 382 S.E.2d 40 (1989). *See Watts v. Lincoln County Bd. of Educ.*, Docket No. 98-22-375 (Jan. 22, 1999). As stated in *Duruttya, supra*, "the grievance process is for "resolving problems at

the lowest possible administrative level." Additionally, *Spahr, supra*, indicates the merits of the case are not to be forgotten. *Id*. at 743. *See, Edwards v. Mingo County Bd. of Educ.*, Docket No. 95-29-472 (Mar. 19, 1996). Further, *Duruttya, supra*, noted that in the absence of bad faith, substantial compliance is deemed acceptable.

6. "The grievance procedure should not become a trap for either the employees or employers, but rather it should work so that disputes are resolved consistently and fairly, as early as possible within the procedure." *Rutherford v. W. Va. Bureau for Emp. Programs*, Docket No. 03-BEP-040D (Mar. 24, 2003).

7. Respondent originally scheduled the Level One hearing within the fifteen-day time frame as required by law, but it had to be rescheduled because Grievant, Grievant's Representative, and Grievant's supervisor were unavailable on the selected day. Respondent was then prevented from scheduling the Level One hearing within the fifteen-day time frame due to the illness of Grievant's supervisor. Respondent acted in good faith in attempting to schedule and conduct the Level One hearing within the statutory time frame. Respondent did not act with the intent to delay the grievance process, and it was not negligent in scheduling the Level One hearing.

8. Grievant/Grievant's Representative contributed to the delay in scheduling the Level One hearing by failing to respond to Respondent's email communication regarding scheduling.

Accordingly, Grievant's "Motion for Default Judgement (sic)" is **DENIED**. Respondent's Motion to Consolidate Grievance dated July 25, 2011, shall be granted. This

matter shall be, and is hereby consolidated with Grievant's pending grievance matter, Docket No. 2011-1772-CONS.

Date: December 8, 2011

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CARRIE H. LEFEVRE
ADMINISTRATIVE LAW JUDGE