THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

PEGGY SMITH,
Grievant,

v. **Docket No. 2013-2255-CONS**

WOOD COUNTY BOARD OF EDUCATION,
Respondent.

DEFAULT DECISION

Grievant, Peggy Smith, was employed as a bus operator by Respondent, Wood County Board of Education ("WCBOE"). She filed two grievances against WCBOE on May 24, 2013, at Docket Nos. 2013-1962 and 2013-1963. Grievant filed a claim of default with the Grievance Board against WCBOE on June 18, 2013. A hearing was held on September 20, 2013, at the West Virginia Public Employees Grievance Board in Charleston, West Virginia to take evidence on the issue of whether a default had occurred. Grievant appeared *pro se* and Respondent was represented by Richard Boothby of Bowles Rice LLP. Following the hearing, the parties agreed to submit Proposed Findings of Fact and Conclusions of Law, which were filed by Grievant on October 11, 2013, and by Respondent on October 31, 2013. This matter became mature for decision on October 31, 2013.

Synopsis

The default provisions of W. VA. CODE § 6C-2-4(a)(2) require that written notice of a level one conference be given, and that the conference must be held within ten days of receipt of a grievance by Respondent. Respondent failed to

schedule and provide notice of a level one conference within ten days of receipt of the grievance. Respondent defaulted. Moreover, Respondent failed to meet its burden of proving justified delay or excuse.

The following Findings of Fact are found to be proven by a preponderance of the evidence based upon the entire record developed in this matter.

Findings of Fact

1. Grievant was employed by Respondent WCBOE as a bus operator. She retired effective July 31, 2013.

2. On May 24, 2013, Grievant filed two grievances regarding the bus assigned to her. These grievances were identical and were, therefore, consolidated.

3. When Grievant did not receive any communication from Respondent by June 18, 2013, Grievant called the Office of the Superintendent of Wood County Schools on that date, and spoke with the secretary to determine why level one conferences had not been scheduled. The secretary informed Grievant that she would speak with Assistant Superintendent of Human Resources, Mr. Robert Harris, regarding the matter.

4. During the relevant time period, Ms. Sue Woodward, the Assistant Superintendent of Support Services, who oversaw service personnel grievances, retired.

5. Mr. Michael Fling, a former principal, replaced Ms. Woodward upon her retirement. When he assumed his new position, Mr. Fling was not informed of Grievant's two pending grievances. At that time, Mr. Fling was unaware that

W. VA. CODE § 6C-2-3(b)(1) requires the employer to schedule a level one conference within 10 days of the filing of the grievance. However, when he learned of the Grievant's pending grievances on June 18, 2103, he notified Mr. Robert Harris, Assistant Superintendent of Human Resources, of the same. Mr. Fling was not supposed to officially begin work in his new position until July 1, 2013, but was in the office to "get ahead" on June 18, 2013.[1]

6. On June 18, 2013, Mr. Harris sent a letter to Grievant regarding her grievances and requested an extension of the time lines for holding the level one conferences. Mr. Harris explained that the extension was being requested because there was a misunderstanding about a settlement of the matter between Grievant and the Director of Transportation and because the Superintendent was out of town until June 25, 2013.

7. Grievant filed a Motion for Default Judgment on June 18, 2013.

8. Grievant received the June 18, 2013, letter from Mr. Harris on or about June 20, 2013.

9. The level one conferences were not held timely, per the requirements of W. VA. CODE § 6C-2-3(b)(1).

10. During the relevant time period, Ms. Sharon Buzzard, the Executive Secretary for the Superintendent of WCBOE, who served in that position for decades and handled the scheduling of grievance hearings, retired from

[1] Default Hearing-Testimony of Mr. Michael Fling, Assistant Superintendent of WCBOE.

WCBOE.[2] In addition, Ms. Buzzard was sick during some, but apparently not all, of the relevant time period.

11. In addition, during the same time period, Attorney Dean Furner, who had been counsel for the WCBOE for many years, ceased handling WCBOE's legal matters, including grievances.[3]

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); and *Harless v. W. Va. State Police,* Docket No. 07-WVSP-080D (Mar. 21, 2008). "The grievant prevails by default if a required response is not made by the employer within the time limits established in this article ... " W. VA. CODE § 6C-2-3(b)(1). 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). Grievant asserts that Respondent defaulted by not scheduling level one conferences within the time period required

[2] *Id.*

[3] It should be noted that specific dates of retirements, personnel changes, and change in legal counsel were not provided.

by the applicable statutory provisions.[4] The time period for holding a level one conference is governed by W. VA. CODE § 6C-2-4(a)(2), which states:

> (2) Conference. -- The chief administrator shall hold a conference ... within ten days of receiving the grievance. A conference is a private, informal meeting between the grievant and the chief administrator to discuss the issues raised by the grievance, exchange information and attempt to resolve the grievance. The chief administrator may permit other employees and witnesses to attend and participate in a conference to reach a resolution.
> The chief administrator shall issue a written decision within fifteen days of the conference.

"'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-2-2(c). This statute clearly states that the time period for a response by the employer begins to run on the date the chief administrator receives the grievance. Grievant filed two grievances on May 24, 2013, and her level one conferences for those grievances should have taken place on or before June 15, 2013. It is uncontested that the level one conferences did not take place then, per the mandate of W. VA. CODE § 6C-2-4(a)(2).

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[4] The *pro se* Grievant makes an apt appeal to the Grievance Board in her letter/findings of fact and conclusions of law asking, "What would happen if I did not show up for work for 15 days or more not calling off or calling to tell them what was going on and why I was not reporting for work? I would probably have been fired. This is what I feel they have done by ignoring the time lines." Essentially, Grievant is asking why Respondent should be excused from complying with the mandated statutory deadline, when she would surely have been held responsible to abide by Respondent's applicable rules and procedures during her employment with WCBOE.

Respondent does not claim that injury or illness was the cause for the delay in scheduling the conferences. Respondent contends that it was neither careless nor negligent in failing to schedule the conferences and had no intent to delay the grievance process. Rather, Respondent asserts that it was prevented from scheduling the conferences due to a, "vexing series of contemporaneous retirements and discontinued employment of key persons who handled grievance matters for the Board--Sue Woodward, Sharon Buzzard, and Dean Furner." Respondent asserts that these circumstances caused a "justified delay" under W. VA. CODE § 6C-2-3(b)(1). There is no indication that Respondent intended to delay the grievance process. In fact, apparently, as soon as Mr. Fling and Mr. Harris were alerted to the fact that Grievant was awaiting level one conferences, they acted to obtain an extension and arrange the conferences, by sending the June 18, 2013, letter to Grievant.[5] However, the deadline to provide these had already passed.

" … [F]or 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." *Dunlap v. Dep't of Envtl. Prot.*, Docket No. 2008-0808-DEP/DEF (Dec. 8, 2008). 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

[5] Mr. Fling wrote the letter for Mr. Harris' signature.

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). "Clearly, any delay cannot be an excuse for default if the event giving rise to the delay was caused by inattention or bad faith." *Dunlap, supra.*

Respondent showed that the individuals who normally handled grievances and scheduled level one conferences for WCBOE were absent from the workplace during the relevant period at various times for various reasons. At the end of any school year, there are undoubtedly personnel changes and numerous personnel who elect to take days off. The personnel changes at the WCBOE in June 2013 were, indeed, significant, with the retirement of longtime employees and their replacement by other employees. In addition, WCBOE had a change in legal counsel. However, Respondent did not introduce any evidence that the above-described retirements, absences and/or personnel changes were unanticipated, except that Ms. Buzzard was sick during some, but apparently not all, of the relevant time period. Respondent did not indicate that Superintendent Law's absence was unforeseen either. WCBOE was responsible to hire and train new staff to handle any grievances filed. Therefore, these retirements, absences and personnel changes were not "unexpected … events … outside of the defaulter's control." *Id.* As such, Respondent failed to prove that its delay in timely scheduling conferences to respond to the subject grievances, was due to a " … justified delay, not caused by negligence or an intent to delay the grievance

process …" under W. VA. CODE § 6C-2-3(b)(1). This default was due to "inattention" during an anticipated time of transition. Given the facts presented, Grievant has met her burden of proving default and Respondent did not meet its burden of proving justified delay.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. Grievants who allege a default at a lower level of the grievance process have 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 time period for holding a level one conference is governed by W. VA. CODE § 6C-2-4(a)(2), and requires the chief administrator to hold a conference within ten days of receiving the grievance.

3. Grievant met her burden of proving default, as level one conferences were not provided within the ten day period mandated under W. VA. CODE § 6C-2-4(a)(2).

4. "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).

5. 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).

6. 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.

7. 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 King's 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).

8. Respondent 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, Grievant's request for judgment by default is **GRANTED,** and Respondent may proceed to show that the remedy sought by Grievant is contrary to law or contrary to proper and available remedies. The parties are to confer and provide the Grievance Board with at five (5) mutually agreeable dates for scheduling the default remedy hearing. Said dates must be received by the Grievance Board on or before January 2, 2014.

DATE: December 17, 2013

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SUSAN L. BASILE
ADMINISTRATIVE LAW JUDGE