WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

PAULA JAYNE THOMAS,
Grievant,

v. **Docket No. 2013-1820-MAPS (Remedy)**

REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY/SOUTHWESTERN REGIONAL JAIL,
Respondent.

DEFAULT REMEDY DECISION

Grievant, Paula Thomas, is employed by Respondent, Regional Jail and Correctional Facility Authority ("Authority"), as a Correctional Officer 3 ("CO 3") assigned to the Southwestern Regional Jail. Grievant filed a level one grievance form dated May 1, 2013, alleging:

> I was suspended for 10 working days without good cause for "failing to report or document the existence of an unusual incident that occurred during working hours at the Southwestern Reg. Jail."

As relief Grievant sought:

> Reimbursement for 10 working days pay. Reinstatement any time in seniority in rank or annual time that may have been lost due to the suspension. I would also like to have the suspension letter removed from my file and reimbursement on any expenses that [may] occur in travel or preparation for all levels grieved.

Grievant filed a second form dated May 23, 2013, in which she alleges:

> Respondent failed to make any effort to provide any justified delay in holding a Level One Conference within the time limits established in W. Va. Code 6c-2-3(b)(1).

Due to the default, Grievant seeks to be awarded all of the relief she sought in her original grievance form.

A Default Hearing was held in the Charleston office of the West Virginia Public Employees Grievance Board on June 12, 2013. Default was granted by a decision dated July 19, 2013. Pursuant to 156 C.S.R. 1 § 7, a hearing was held on September 3, 2013, to determine if the remedy sought be Grievant was proper and available by law. Grievant appeared *pro se* and Respondent was represented by Shane McCullough, General Counsel for the Authority. Both parties waived the right to file Proposed Findings of Fact and Conclusions of Law. This matter became mature for decision on September 3, 2013.

Synopsis

Since Grievant prevailed on the merits by default, the sole issue is whether the remedies sought by Grievant are contrary to law or contrary to proper and available remedies. Respondent conceded that Grievant was entitled to ten days of back pay and to removal of all record of the suspension from Grievant's file, but argued that she was barred from receiving travel expenses by statute. Grievant argued that she was entitled to a promotion she would have received had she not been suspended.

Grievant is entitled to back pay and removal of the suspension from her record. All other relief is either barred by statute or too speculative to be proper under the circumstances.

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

Findings of Fact

1. Grievant Thomas is employed as a CO 3 at the Southwestern Regional Jail which is operated by the Respondent.

2. Grievant filed a level one grievance dated May 1, 2013, challenging a ten day suspension.

3. Grievant filed a notice of default dated May 23, 2013, alleging no level one conference had been held or scheduled.

4. Default was granted by a Decision dated July 19, 2013.

5. In her original grievance, Grievant Thomas sought the following remedy:

> Reimbursement for 10 working days pay. Reinstatement any time in seniority in rank or annual time that may have been lost due to the suspension. I would also like to have the suspension letter removed from my file and reimbursement on any expenses that [may] occur in travel or preparation for all levels grieved.

Discussion

Default grievances are generally bifurcated. In the first hearing, it is determined whether a default actually occurred. If a default is proven, a second hearing is held to determine if any of the remedies requested by the grievant are "contrary to law or contrary to proper and available remedies." W. VA. CODE § 6C-2-3(b)(2). Once the default is established, the second hearing addresses the remedies requested by the grievant. At that hearing, the respondent has the opportunity of showing that the remedy requested by the prevailing grievant is contrary to law or contrary to proper and available remedies. These issues are sometimes matters of law that may not require the presentation of evidence, but to the extent that proof is required, the respondent has the burden of proving this affirmative defense by a preponderance of the evidence. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008). *Dunlap v. W. Va. Dep't of Envtl. Prot.,* Docket No. 2008-0808-DEP (Mar. 20, 2009).

Grievant seeks for specific remedies: 1) Reimbursement for ten working days pay; 2) removal of the suspension letter from her employment record; 3) reimbursement for any expenses incurred in travel or preparation for grievance hearings; and, 4) reinstatement in rank or annual time that may have been lost due to the suspension.

Respondent concedes that Grievant is entitled to be reimbursed for the ten days of pay she lost due to the suspension and to have all evidence of the suspension removed from her employment record. Respondent argues that all parties are required by statute to bear their own expenses for levels one, two and three of the grievance procedure. W. VA. CODE § 6C-2-6 specifically states that:

> (a) Any expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expenses.

Since the statute requires that all parties bear their own expenses, granting Grievant's request for expenses would be contrary to law.[1]

Finally, Grievant alleges that she was not granted a promotion while this matter was pending because she had been suspended and seeks to receive that promotion. However, Grievant conceded that she would not have been guaranteed to receive the promotion had she not been suspended. This remedy is too speculative to be proper under these circumstances. *See generally, Jackson v. Div. of Juvenile Ser.,* Docket No. 2012-0442-MAPS (Dec. 19, 2012). Accordingly, Grievant is entitled to ten days of pay that she lost due to the suspension and to have all evidence of the suspension removed from her employment record. Grievant is barred by statute from receiving expenses

[1] An Administrative Law Judge may assess cost and expenses against a party found to be guilty of bad faith. W. VA. CODE § 6C-2-4(c)(6) No such finding was made in this matter.

incurred in processing the grievance and the remedy of a promotion is too speculative to be proper under the circumstances.

Conclusions of Law

1. In the remedy phase of a default grievance, the respondent has the burden of proving by a preponderance of the evidence that the remedies requested by the grievant are contrary to law or contrary to proper and available remedies. W. VA. CODE § 6C-2-3(b); Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *Dunlap v. W. Va. Dep't of Envtl. Prot.,* Docket No. 2008-0808-DEP (Mar. 20, 2009); *See Hoff v. Bd. of Trustees*, Docket No. 93-BOT-104 (June 30, 1994) and *Flowers v. W.Va. Bd. of Trustees*, Docket No. 92-BOT-340 (Feb. 26, 1993), cited in support of this proposition in *Lohr v. Div. of Corrections*, Docket No. 99-CORR-157D (Nov. 15, 1999).

2. Respondent concedes that Grievant is entitled to be reimbursed for the ten days of pay she lost due to the suspension and to have all evidence of the suspension removed from her employment record, and that these are lawful and proper remedies.

3. W. VA. CODE § 6C-2-6 requires that, "Any expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expenses." Accordingly, it would be contrary to law to award Grievant expenses she incurred in the grievance process without a finding of bad faith.

4. Grievant was not certain to receive a promotion had she not been suspended so granting her the promotion as a remedy would be too speculative to be proper under the circumstances of this case. *See generally, Jackson v. Div. of Juvenile Ser.,* Docket No. 2012-0442-MAPS (Dec. 19, 2012).

Accordingly the Grievance is GRANTED in part and DENIED in part.

Respondent is ORDERED to pay Grievant ten days of pay and benefits that she would have received had she not been suspended and to remove all evidence of the suspension from her employment record. All other remedies sought in this matter are DENIED.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

DATE: SEPTEMBER 4, 2013.

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WILLIAM B. MCGINLEY
ADMINISTRATIVE LAW JUDGE