**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**SUE BISHOP, ET AL.,**
**Grievant,**

**v.** **Docket No. 2013-0185-CONS**

**DEPARTMENT OF VETERANS ASSISTANCE,**
**Respondent.**

## DECISION

Grievants, Sue Bishop[1], Mary Baisden, Andrea Ball, Kelley Hite, Melissa Lafon, Ginger Maynard, and Mary Stroud are employed by Respondent, Department of Veterans Assistance at the West Virginia Veterans Home. Between July 23, 2012 and July 26, 2012, Grievants filed separate grievances against Respondent. Each grievance form had the same statement of grievance and requested relief. Grievants state,

> We feel the demeanor of our Administrator does not follow the division of personnel employee conduct act or the DOP-P6 prohibited workplace harassment, due to the conduct shown in the past few months. Last incident 7/13/12 when Administrator referred that nursing staff have 'our filters turned off' when it comes to Resident Care issues. Administrator also requesting discipline for employees regarding issues that are not investigated or proven.

For relief, Grievants seek, "cease and desist harassment and intimidation immediately and follow all DOP policies and procedures."

Grievants moved for default judgment on August 10, 2012. The grievances were consolidated into the above number by order entered August 16, 2012. Following a hearing on the motion for default, an Order Granting Default was entered on February 7,

[1] Ms. Bishop is now retired. As her grievance relates only to conditions of employment and she is no longer employed, Ms. Bishop's grievance is now moot.

2013. A default remedy hearing was held on May 20, 2013, before the undersigned at the Grievance Board's Charleston, West Virginia office. Grievants were represented by Patricia Ramey. Respondent was represented by counsel, Jennifer S. Greenlief, Assistant Attorney General. This matter became mature for decision on June 18, 2013, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

## Synopsis

Grievants prevailed on the merits by virtue of Respondent's default. Grievants are entitled to relief unless the remedies sought are contrary to law or not proper or available at law. Harassment is a grievable event, for which remedy is available. Ordering Respondent to follow DOP policies and procedures would be meaningless, and relief for violations that have not already occurred would be speculative. Accordingly, the grievance is granted, in part, and denied, in part.

The following Findings of Fact are based upon a complete and thorough review of the record created in this grievance:

## Findings of Fact

1. Grievants are employed by Respondent at the West Virginia Veterans Home. Grievants are employed as Registered Nurses, Liscensed Practical Nurses, and Health Service Workers.

2. Grievants prevailed on the merits of their grievance by Order Granting Default entered February 7, 2013.

3. The West Virginia Veterans Home Administrator did not follow the Division of Personnel employee conduct or prohibited workplace harassment rules and policies.

4. On July 13, 2012, the Administrator stated that nursing staff have their "filters turned off' regarding resident care issues.

5. The Administrator also requested discipline for employees regarding issues that are not investigated or proven.

**Discussion**

It was previously determined in the Order Granting Default entered February 7, 2013, that Respondent had defaulted due to failure to respond within required timeframes with no excusable reason for the failure. The subsequent hearing and this decision is regarding the remedy requested by Grievants. Because Respondent defaulted at level one, Grievants are considered to have prevailed on the merits of the case. Therefore, as a matter of law, the hospital administrator has failed to follow DOP rules regarding employee conduct and DOP's policy on prohibited workplace harassment, told nursing staff they have their "filters turned off," and requested discipline for employees regarding issues that were not investigated or proven.

At this time the only remaining issue is the remedies requested by Grievants. "In making a determination regarding the remedy, the administrative law judge shall determine whether the remedy is proper, available and not contrary to law." W. VA. CODE § 6C-2-3(b)(2). "If the administrative law judge finds . . . that the remedy is contrary to law or not proper or available at law, the administrative law judge may deny the default or modify the remedy to be granted to comply with the law or otherwise make the grievant whole." W. VA. CODE § 6C-2-3(b)(3).[2] In the remedy phase, "the

[2] "[U]nder the prior, now repealed, statute on default, grievants were "presumed" to have prevailed on their grievances, and respondents could then attempt to rebut that presumption. With the enactment of West Virginia Code § 6C-2-3, the presumption and

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." *Dunlap v. Dep't of Envtl. Protection*, Docket No. 2008-0808-DEP (Dec. 8, 2008).

The first remedy Grievants seek is that Respondent cease and desist harassment and intimidation immediately. Although the requested remedy is somewhat unclear on its face, read in conjunction with the grievance statement, it is apparent Grievants seek for the harassment and intimidation by the Administrator to cease. Respondent argues that this remedy is in the nature of injunctive relief, and that Grievants did not present enough facts to meet the high standard for injunctive relief. This argument is not persuasive. Grievants have no burden, having already prevailed on the merits of the case. That they were harassed repeatedly by the Administrator has been proven by action of the default of Respondent. The question is whether ordering the intimidation and harassment to cease immediately is proper, available and not contrary to law.

Harassment is a grievable event. W. VA. CODE § 6C-2-2(i)(1). Further, an employer "bears some responsibility to intervene and stop an employee from engaging in conduct which by definition constitutes harassment." *White v. Monongalia County Bd. of Educ.*, Docket No. 93-30-371 (March 31, 1994). The Grievance Board has

---

the ability to attempt to rebut the same were eliminated. Therefore, cases dealing with the issue of default under the now repealed Code section(s) are no longer controlling." *Stuart v. Div. of Juvenile Serv.*, Docket No. 2011-0171-MAPS (Sept. 23, 2011).

ordered a respondent employer to intervene to stop the harassment of an employee by another employee or supervisor. *See Shaffer v. Kanawha County Bd. of Educ*., Docket No. 2013-0161-KanED (Sept. 19, 2013); *Grant v. Cabell County Bd. of Educ*., Docket No. 04-06-345 (Feb. 28, 2006); *Moreland v Bd. of Trustees*, Docket No. 96-BOT-462 (April 29, 1997). Therefore, this is an available remedy. However, since Grievants did not request specific remedies, such as the removal of discipline or performance evaluations, the remedy is limited to ordering Respondent to intervene to ensure harassment and intimidation of these employees by the Administrator ceases by whatever means Respondent deems appropriate.

The second remedy Grievants seek is that Respondent be ordered to follow all DOP policies and procedures. Relief cannot be granted for the violations of policy that have already occurred, as Grievants did not request any specific relief for those violations. Further, Respondent is already required to follow DOP policies and procedures, so an order for Respondent to do so is meaningless. Relief for violations that have not already occurred would be speculative. If Respondent violates policy or procedure in the future, Grievants may then avail themselves of the grievance process.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. Grievants prevailed on the merits of the case by virtue of Respondent's default.

2. In the remedy phase of a default action, "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." *Dunlap v. Dep't of Envtl. Protection*, Docket No. 2008-0808-DEP (Dec. 8, 2008).

3. "In making a determination regarding the remedy, the administrative law judge shall determine whether the remedy is proper, available and not contrary to law." W. VA. CODE § 6C-2-3(b)(2). "If the administrative law judge finds . . . that the remedy is contrary to law or not proper or available at law, the administrative law judge may deny the default or modify the remedy to be granted to comply with the law or otherwise make the grievant whole." W. VA. CODE § 6C-2-3(b)(3).

4. Harassment is a grievable event for which remedy is available.

5. Respondent is already required to follow DOP policies and procedures, so an order for Respondent to do so is meaningless. Relief for violations that have not already occurred would be speculative.

Accordingly, the remedies requested by Grievants are **GRANTED** in part and **DENIED** in part**.** Respondent shall intervene to ensure harassment and intimidation of Grievants by the Administrator cease by whatever means Respondent deems appropriate. Respondent shall not be ordered to follow all DOP policies and procedures.

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* W. VA. CODE ST. R. § 156-1-6.20 (2008).

**DATE: October 21, 2013**

_____

**Billie Thacker Catlett**
**Administrative Law Judge**