THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

TAMARA WALKER,

Grievant,

v. **Docket No. 2013-0202-KanED**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

ORDER GRANTING DEFAULT

Grievant, Tamara Walker, filed a written Notice of Intent to Force Default against her employer, Respondent, Kanawha County Board of Education, on January 23, 2013, regarding the grievance she filed at level one on August 14, 2012. This Notice of Intent to Force Default asserts that the level one decision was issued outside the timeframe established by West Virginia Code § 6C-2-4(a)(3). A hearing was held on February 26, 2013, at the Grievance Board's office in Charleston, West Virginia, before the undersigned administrative law judge, for the purpose of taking evidence on the issue of whether a default had occurred at level one. Grievant appeared in person and by counsel, Katherine L. Dooley, and Respondent appeared by counsel, James W. Withrow, Jr. This matter became mature for decision upon receipt of the last of the parties' written proposed Findings of Fact and Conclusions of Law on April 1, 2013.

Synopsis

Grievant argues that a default occurred at level one of the grievance process because the level one decision was not issued within fifteen days after the conclusion of the hearing as required by statute. Respondent denies the same, arguing that the parties agreed to an extension of the statutory time lines for the issuance of the level

one decision. Grievant denies entering into any such agreement. Grievant proved by a preponderance of the evidence that a default occurred at level one. Therefore, Grievant's claim for default is GRANTED.

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

Findings of Fact

1. Grievant initiated this grievance action on August 14, 2012.

2. Due to Grievant's medical condition and retention of counsel, the initial level one hearing on the grievance was delayed.

3. The level one hearing was conducted on October 29, 2012. However, the hearing was not completed on that date.

4. A second day of hearing was conducted on December 13, 2012, and the matter was completed that day.

5. At the conclusion of the level one hearing, the parties waived the submission of proposed findings of fact and conclusions of law.[1]

6. The Grievant did not waive the statutory fifteen-day time line for the issuance of the level one decision.

7. Grievant filed her Notice of Intent to Force Default on January 23, 2013.

8. The level one hearing examiner issued her decision on January 24, 2013, as stated on its certificate of service. The decision itself is dated January 23, 2013. *See*, Respondent's Exhibit 2.

[1] *See,* Respondent's Exhibit 1, pp. 339-340, excerpt of level one hearing transcript.

Discussion

A grievant who alleges a default at a lower level of the grievance process has 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). "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 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). The issue to be decided at this time is whether a default occurred, and, if so, whether the employer has a statutory excuse for not responding within the time required by law. *See Dunlap v. Dep't of Envtl. Protection*, Docket No. 2008-0808-DEP (Dec. 8, 2008).

Default grievances are generally bifurcated.[2] In the first hearing, it is determined whether a default actually occurred. If a default is found to have occurred, a second hearing is conducted to determine whether any of the remedies sought by the grievant are "contrary to law or contrary to proper and available remedies." W. VA. CODE § 6C-2-

[2] *See* Public Employees Grievance Board, 156 C.S.R. 1 § 7.1 (2008).

3(b)(2). 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. *See* W. VA. CODE § 6C-2-3(b)(2). If Respondent demonstrates that a default has not occurred because it was prevented from meeting the timelines for one of the reasons listed in West Virginia 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.

Grievant argues that a default occurred because the level one hearing examiner failed to issue her decision within fifteen days after the conclusion of the hearing. Respondent asserts that there has been no default because Grievant had waived the strict time lines for the issuance of a decision and because Respondent received Grievant's Notice of Intent to Force Default after the issuance of the level one decision.

Based upon the evidence presented, it is clear that the level one hearing examiner failed to issue a decision within fifteen days after the conclusion of the hearing. The hearing was concluded on December 13, 2012. The parties waived the submission of proposed Findings of Fact and Conclusions of Law. Grievant filed her Notice of Intent to Force Default on January 23, 2013. The decision was issued on January 24, 2013.

WEST VIRGINIA CODE § 6C-2-3(b)(1) excuses the employer from making a required response within the statutory time lines if the employer is prevented from making the response "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).

However, Respondent does not raise the defenses of injury, illness, or justified delay. Instead, Respondent asserts that, at the conclusion of the level one hearing, Grievant waived the strict statutory time lines for the issuance of the level decision. In support of its position, Respondent cites a discussion held near the end of the proceeding on December 13, 2012, regarding the issuance of the level one decision. Respondent likens the situation in this grievance to that of *Kunik v. Board of Directors/West Virginia Northern Community* College, Docket No. 00-BOD-048 (July 17, 2000) and *Cook v. Division of Natural* Resources, Docket No. 03-DNR-045D (May 5, 2003).

The following is the discussion that Respondent references, and it is contained in the transcript from the December 13, 2012, hearing:

> EXAMINER LAMBRIGHT: Just to notify everybody Lisa and I did go through all the documents. We now have everything. So and in the right order, we hope, and I want everybody to watch that I'm giving custody of all these documents to Lisa. I no longer am taking responsibility for these. They are all out court reporter's.
>
> Okay. Next thing is a procedural matter. I haven't seen it yet, but I understand the first day of testimony Lisa has already transcribed. She's also done the thing that your secretary wanted, whatever it is.
>
> MS. DOOLEY: Right.
>
> EXAMINER LAMBRIGHT: When, Ms. Court Reporter, can we expect the—don't you make faces at me. When, two weeks? Okay. I didn't know whether Christmas was going to hold you up or not. Two weeks. Okay. We understand Christmas comes and you do the best you can do.
>
> Mr. Withrow, when we were not on the record I think Ms. Dooley said that she did not want to file Findings—Proposed Findings and Conclusions. Do you want to file Findings and Conclusions?

MR. WITHROW: You know, that's very unusual that we don't. On the other hand, I mean I don't suspect that there's any particularly novel issues or any novel factual or legal issues. It is what it is. So if Ms. Dooley's waiving that right then I would do so as well.

EXAMINER LAMBRIGHT: You don't have to. I mean just because she has doesn't mean that you don't have to. All right, so you are waiving it.

All right, I would like to be able to tell you when I'm going to have my decision out, and I know that Ms. Dooley would like to have that decision. I don't know. It will depend on when I can get the transcript quite honestly. I have two other decisions due the beginning of January, but if I get the transcript in a reasonable time I would assume that I could get it done and back to you-all within two weeks.

It's a recommended decision, is that correct, Mr. Withrow?

MR. WITHROW: Well, actually, no. You have been designated by the Superintendent as the Level I Grievance Evaluator and you are—

EXAMINER LAMBRIGHT: Okay. If I have been done—I believe you, but I do not have documentation of that, but I will take your word for it. So this is not going to be a recommended decision, this is going to be an actual decision. Okey-dokey.

MR. WITHROW: An appealable decision.

EXAMINER LAMBRIGHT: Okay. None the less, I will do the very best I can to go it as quickly as I can. It will depend on when I can get the transcript and the exhibits, which are now your custody. Okay.

Anything else you would like to add?

MS. DOOLEY: Well, yeah, I want to add that my client has been going through this improvement process. I really want to make a motion to grant on the record, in view of the evidence, but she's at the point where the coach wants her

> to send out an evaluation to people throughout the County. I think that's patently unfair. . . .[3]

See, Respondent's Exhibit 1 pp. 338-341.

From the transcript, it is clear that there was no discussion of extending the statutory time lines. Further, there was no agreement of the parties to any extension of the time lines, or an agreement that the decision would be issued only after the transcript was completed. The exchange suggests that the hearing examiner was not aware that her decision was due within fifteen days as set by statute. The hearing examiner only tells the parties that she does not know when she will have the decision completed, and that she will get it finished as quickly as she can. Therefore, the undersigned cannot conclude that Grievant waived the strict statutory time lines.

The cases of *Kunik* and *Cook* are distinguishable from the instant grievance. In *Kunik*, the hearing examiner asked the parties if they had an objection to an extension of the deadline because he wanted to review the transcript before issuing the decision. Neither party objected to going beyond the statutory guidelines, and the record did not indicate that they had set a date certain. The Grievance Board held that there was no default as the parties entered into an open-ended agreement to an extension of the time line. *See Id.* In *Cook*, the parties agreed to submit their proposed Findings of Fact and Conclusions of Law to the level one hearing examiner on a date that was *after* the decision would have ordinarily been due. The Grievance Board held that even though there was not a specific conversation on extending the deadline for the issuance of the decision, the Grievant's acquiescence to setting the deadline for submissions beyond

[3] There is no further discussion of the issuance of the level decision contained in the record. *See,* Respondent's Exhibit 1, excerpt of December 13, 2012, level one hearing transcript.

the date the decision would have been due was a waiver of the right to a decision within the statutory guidelines. *See Id.* The situations described in these two grievance cases are quite different than what occurred in the matter at hand.

Respondent also argues that Grievant filed her Notice of Intent to Force Default *after* the issuance of the level one decision; therefore, no default occurred. This argument is not supported by the evidence. Grievant faxed her Notice of Intent to Force Default to Respondent on January 23, 2013. Hard copies of the same were mailed to Respondent that day, as well. On that same day, counsel for Respondent mailed a copy of Grievant's Notice of Intent to Force Default, along with a cover letter objecting to the same and requesting a hearing on the matter, to the Grievance Board. The level one examiner issued her decision on January 24, 2013, as stated on its certificate of service. However, it is unclear from the certificate of service whether the decision was hand-delivered or mailed. The decision itself is dated January 23, 2013. As such, Respondent's argument fails.

For the foregoing reasons, the undersigned must conclude that a default occurred when the level one hearing examiner failed to issue a decision within fifteen days of the conclusion of the hearing.

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

Conclusions of Law

1. A grievant who alleges a default at a lower level of the grievance process has 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 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 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).

3. Grievant proved by a preponderance of the evidence that a default occurred when the level one hearing examiner failed to issue a decision within fifteen days of the conclusion of the hearing.

4. WEST VIRGINIA CODE § 6C-2-3(b)(1) excuses the employer from making a required response within the statutory time lines if the employer is prevented from making the response "directly as a result of injury, illness, or a justified delay not caused by negligence or intent to delay the grievance process."

5. Respondent failed to prove by a preponderance of the evidence any excuse for the default.

Accordingly, this 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 directed to confer with one another and provide the Grievance Board with **at least three (3) mutually agreeable dates** for scheduling the

remedy hearing. The parties shall submit their agreeable dates to the Grievance Board **no later than August 30, 2013**.

Dated: August 19, 2013.

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Carrie H. LeFevre
Administrative Law Judge