THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

SUE BISHOP, et al.,
Grievants,

v. **DOCKET NO. 2013-0185-CONS**

DEPARTMENT OF VETERANS ASSISTANCE,
Respondent.

ORDER GRANTING DEFAULT

Grievants Sue Bishop, Kelley Hite, Mary Stroud, Mary Baisden, Andrea Ball, Melissa LaFon, and Ginger Maynard filed a claim of default with the Grievance Board against their employer, the Department of Veterans Assistance, on August 10, 2012, alleging a default had occurred at level one of the grievance procedure. After the default claim was filed, the seven separate grievances were consolidated by the Grievance Board by Order dated August 16, 2012. A hearing was held on September 24, 2012, before Billie Thacker Catlett, Administrative Law Judge, for the purpose of taking evidence on the issue of whether a default had occurred. Grievants were represented by Patricia Ramey, and Respondent was represented by Mike Lyons, Operations Manager for the Department of Veterans Assistance. This case became mature for decision on October 23, 2012, the deadline for submission of proposed findings of fact and conclusions of law. Grievants submitted written proposals, but Respondent declined to do so. This matter was transferred to the undersigned for administrative reasons on January 30, 2013.

Synopsis

The default provisions require that written notice of the level one conference be given, and that the level one conference be held within ten days of receipt of a grievance by Respondent. No written notice was provided to any of the Grievants of the level one conference, and no level one conference was scheduled within ten days of receipt of the grievance. Respondent defaulted.

The following Findings of Fact are made based upon the record developed at the default hearing.

Findings of Fact

1. Grievants are employed by the Department of Veterans Assistance ("DVA") in the Nursing Department at the West Virginia Veterans Home in Barboursville, West Virginia.

2. Each Grievant filed a grievance asserting that their administrator's behavior "does not follow the division of personnel employee conduct act or the DOP-P6 prohibited workplace harassment." Grievants sought as relief, "cease and desist harassment and intimidation immediately and follow all DOP policies and procedures." These grievances were dated July 23, 24, and 25, 2012, and were all received by the Grievance Board on July 26, 2012. All seven Grievants requested a conference at level one.

3. Respondent received notice of the grievances on July 27, 2012.

4. On July 27, 2012, Mike Lyons, Operations Manager for DVA, contacted Grievant Bishop to schedule the level one conference. Grievant Bishop advised Mr. Lyons that she was available for the conference on August 2, 2012. Grievant Bishop was not

scheduled to work on August 2, 2012, and Mr. Lyons did not want her to give up her day off for the conference. Mr. Lyons told Grievant Bishop he would contact her the following week to schedule the conference. Grievant Bishop did not voice any objection to this.

5. Mr. Lyons again contacted Grievant Bishop on August 6, 2012, to schedule the level one conference. Mr. Lyons told Grievant Bishop that the level one conference would be held on August 14, 2012, at 10:00 a.m. Mr. Lyons did not tell Grievant Bishop that this conference would be for all seven Grievants.

6. Grievant Bishop did not tell Mr. Lyons that she objected to the conference being scheduled for August 14, 2012. Grievant Bishop did not state that she was agreeing to an extension of the time period for holding the level one conference, and she did not agree in writing to an extension of the time line for holding the level one conference.

7. Mr. Lyons did not contact any of the other six Grievants or their representative[1] to schedule a level one conference.

8. Neither Mr. Lyons or any other individual employed by DVA prepared or distributed a notice of the date of the level one conference.

9. The default claim was filed with the Grievance Board on August 10, 2012.

10. The level one conference was not held on August 14, 2012, because the default claim had been filed.

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

[1] Mr. Lyons testified that he just did not see Ms. Ramey's name listed on the grievance forms as the representative for the Grievants.

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). "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). (Emphasis added.) 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).

Grievants argued that Respondent defaulted by not scheduling a level one conference within the time period required by the applicable statutory provisions and not obtaining written agreement to extend the time frames, not scheduling a level one conference at all for six of the Grievants, and not sending a written notice of the conference to any of the Grievants.

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.

When these grievances were filed at level one, they were each assigned a separate docket number by the Grievance Board, and were not consolidated into one grievance until after the default claim was filed. At the time Mr. Lyons contacted Grievant Bishop about scheduling the level one conference, there were seven separate grievances, and Grievant Bishop was not the designated representative for the other six Grievants. Mr. Lyons offered no explanation for his failure to schedule a level one conference at all for six of the Grievants. Although it is possible and plausible that he thought the grievances were all together, and that by talking to Grievant Bishop he was scheduling a conference for all the Grievants, Mr. Lyons did not state that this was the case, and the undersigned cannot assume this. Mr. Lyons clearly had notice of the grievances by July 27, 2012, when he contacted Grievant Bishop about scheduling the level one conference. The record does not contain any evidence that any personnel at DVA other than Grievants, was aware of the grievances prior to this date. Accordingly, July 27, 2012, is the date which will be used to calculate when action had to be taken on the grievances by DVA. Ten working days from July 27, 2012, is August 10, 2012. Respondent did not hold a level one conference for any of the Grievants by August 10, 2012, and never set a level one conference for six of the grievances. Respondent's failure to schedule or hold a level one conference for the six Grievants other than Grievant Bishop constitutes a default.

As to the scheduling of the level one conference for Grievant Bishop, Grievant Bishop told Mr. Lyons she could be available on August 2, 2012, for the conference, but

in an attempt to accommodate Grievant Bishop, Mr. Lyons did not want her to have to give up her day off for her level one conference. When Mr. Lyons called Grievant Bishop back on August 6, 2012, to schedule the conference, he told her it could be scheduled for August 14, 2012, 12 days after Respondent became aware of the grievance. While this was clearly past the statutory timeline, and there is no doubt that Respondent did not obtain a written waiver from Grievant Bishop to schedule the conference outside the statutory timelines, the record does not reflect that Grievant Bishop told Mr. Lyons that she objected to the conference being scheduled two days late, and it is more likely than not given the testimony of the witnesses, that she made no such objection until she filed her default claim on August 10, 2012.

> [A] party simply cannot acquiesce to, or be the source of, an error during proceedings before a tribunal, and then complain of that error at a later date. *Rhodes v. Randolph County Bd. of Educ.*, Docket No. 00-42-133D (Jan. 17, 2001); *Lambert v. W. Va. Dep't of Health and Human Res.,* Docket No. 99-HHR-326D (Oct. 14, 1999). *See, e.g., State v. Crabtree*, 198 W. Va. 620, 627, 482 S.E.2d 605, 612 (1996)("Having induced an error, a party in a normal case may not at a later stage of the trial use the error to set aside its immediate and adverse consequences."); *Smith v. Bechtold*, 190 W. Va. 315, 319, 438 S.E.2d 347, 351 (1993)("[I]t is not appropriate for an appellate body to grant relief to a party who invites error in a lower tribunal.")(Citations omitted).

Miller v. Fairmont State Univ., Docket No. 08-HE-005 (Jan. 8, 2009). The undersigned concludes that Grievant Bishop accepted the August 14, 2012, level one conference date when she was speaking to Mr. Lyons. It is clear that, with regard to Grievant Bishop, Respondent acted in good faith, and did not act with intent to delay the grievance process. While the undersigned might be inclined not to find a default with regard to the scheduling of the level one conference for Grievant Bishop, there is one final issue which makes it unnecessary to render such a finding.

W. VA. CODE § 6C-2-3(l) requires that:

> Reasonable notice of a proceeding *shall* be sent at least five days prior to the proceeding to all parties and their representatives and shall include the date, time and place of the proceeding.

(Emphasis added.) It has previously been determined by the Grievance Board "that sending notice is a required response to a grievance." *Kanehl v. Dep't of Envrt'l Protection*, Docket No. 2011-0133-DEP (Dec. 7, 2010). While the statute does not specifically state that the notice must be in writing, use of the word "sent" in the statute makes it clear that the notice must be reduced to writing. Respondent acknowledges that it did not prepare or send written notice of the level one conference to any of the Grievants, and offered no excuse for the failure to do so. Respondent defaulted when it failed to send written notice of the level one conference to any of the Grievants.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. When a grievant asserts that his employer is in 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). 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).

2. "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).

3. The time period for holding a level one conference is governed by W. VA. CODE § 6C-2-4(a)(2), which states that "[t]he chief administrator shall hold a conference within ten days of receiving the grievance."

4. "'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).

5. The time period for a response by the employer begins to run on the date the chief administrator receives the grievance.

6. Respondent defaulted when it did not hold a level one conference on any of the grievances within ten days of receipt of the grievances.

7. W. VA. CODE § 6C-2-3(l) requires that:

> Reasonable notice of a proceeding *shall* be sent at least five days prior to the proceeding to all parties and their representatives and shall include the date, time and place of the proceeding.

(Emphasis added.) This provision makes clear that the notice must be reduced to writing.

8. It has previously been determined by the Grievance Board "that sending notice is a required response to a grievance." *Kanehl v. Dep't of Envrt'l Protection*, Docket No. 2011-0133-DEP (Dec. 7, 2010).

9. Respondent defaulted when it did not send written notice of the level one conference to any of the Grievants.

Accordingly, Grievants' request for judgment by default is **GRANTED.** The parties are **ORDERED** to confer and to provide the Grievance Board with five mutually agreeable dates for scheduling the default remedy hearing by no later than February 22, 2013.

BRENDA L. GOULD
Administrative Law Judge

Date: February 7, 2013