JO ELLEN BENNETT,

Grievant

v. **Docket No. 96-42-234**

RANDOLPH COUNTY BOARD OF EDUCATION,

Respondent

D E C I S I O N

Grievant, Jo Ellen Bennett, employed by the Randolph County Board of Education (Respondent or Board) as a Cook/Custodian, filed a level one grievance on March 19, 1996, in which she alleged, "I was hired as a substitute cook in October, 1977, but was not hired as a regular employee until 1985 as a custodian. I should have been hired as a full time cook before being hired as a custodian. I would like my seniority accredited to my present years of service." Grievant's immediate supervisor lacked authority to resolve the matter at level one. Following an evidentiary hearing, Superintendent Larry Prichard denied the grievance at level two by decision dated May 13, 1996. Grievant appealed to level three on May 21, 1996, and the Board waived consideration on June 6, 1996. The matter was advanced to level four on June 12, 1996, where a supplementary hearing was conducted on February 7, 1997. The grievance became mature for decision with the Board's submission of proposed findings of fact and conclusions of law on March 10, 1997. (See footnote 1)

Issue 1: Timeliness

At level four, Grievant argued that the Board failed to timely issue a level three decision; therefore, she must prevail by default. The Board responds that it acted upon the grievance at its firstregularly scheduled meeting after the appeal was filed, and does not interpret the grievance procedure to require that special meetings, with significant attendant costs, be held solely for the purpose of waiving consideration of a claim.

Relevant statutory provisions addressing this issue include W. Va. Code §18-29-3(a), which states in part:

[i]f a grievance evaluator required to respond to a grievance at any level fails to make a required

response in the time limits required in this article, unless prevented from doing so directly as a result of sickness or illness, the grievant shall prevail by default. Within five days of such default, the employer may request a hearing before a level four hearing examiner for the purpose of showing that the remedy received by the prevailing grievant is contrary to law or clearly wrong.

W. Va. Code §18-29-4(c) requires that "[w]ithin five days of receiving [an] appeal, such governing board may conduct a hearing . . . may review the record submitted by the chief administrator and render a decision based on such record, or may waive the right granted herein and shall notify the grievant of such waiver."

Respondent did not issue its decision to waive consideration within five days as required by statute, and there is no claim that the delay was due to sickness or illness of any Board member(s). Further, the Board has not requested a hearing at level four. The Grievance Board held in Smith v. Bd. of Directors/West Liberty State College, Docket No. 93-BOD-051 (Feb. 17, 1993), that it does not have jurisdiction to enforce a default by an employer that occurred at the lower grievance levels or otherwise make any rulings upon a level four request or motion by a grievant that an employer should lose by means of a default. See Chaffin v. Wayne County Bd. of Educ., Docket No. 92-50- 419 (Aug. 20, 1993). The proper forum for pursing a default judgment is by filing a writ ofmandamus in circuit court, pursuant to W. Va. Code §18-29-9. Martin and Holcomb v. Mason County Bd. of Educ., Docket No. 94-26-261 (Oct. 19, 1994); Jerden v. Lewis County Bd. of Educ., Docket No. 93-21-349 (Aug. 19, 1994).

Issue 2: Seniority

Grievant claims that a number of substitutes with less seniority were improperly hired as regular employees prior to her assignment as a full-time custodian at Tygart Valley High School in 1985. At level four Grievant clarified her request for relief by stating that she was not seeking instatement to any position, but simply wants her seniority date to be adjusted to 1980. The Board asserts that there were no seniority laws until 1981, that it has no records to substantiate that Grievant made application for any positions prior to 1985, and the hiring procedure used by the Board in 1981 cannot be addressed by the present administration.

Although the record is lacking in documentation, the following findings of fact are not in dispute.

Findings of Fact

1. Grievant was initially hired by the Board as a substitute Cook in October 1977. She continued as a substitute Cook through the 1983-84 school year.

2. Prior to the enactment of seniority laws in 1981, the Board did not keep substitute seniority lists and had almost complete discretion in filling service personnel positions.

3. Grievant was hired as a regular, full-time Custodian in 1985.

4. Grievant's employment was terminated in 1989 due to a reduction in force. She was subsequently re-employed on a part-time basis that year, as a Cook. 5. In 1991, Grievant was appointed to a part-time position of Custodian, in addition to her part-time assignment of Cook, making her once again a full-time employee.

6. At least one substitute employee with less seniority than Grievant was hired as a regular, full-time employee before Grievant's assignment in 1985.

7. Although Grievant made periodic inquiries concerning her seniority over the years, she did not file a grievance, or otherwise act to protect her rights prior to March 1996.

Because this matter does not involve a disciplinary issue, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); Bell v. Lincoln County Bd. of Educ., Docket No. 97-22-013 (July 28, 1997); Holly v. Logan County Bd. of Educ., Docket No. 96- 23-174 (Apr. 30, 1997). See W. Va. Code §18-29-6.

While the Board does not contest that a substitute employee with less seniority than Grievant was hired into a regular position in 1982, neither party has any records to show that Grievant applied for this position. Even if it is accepted that she did make application, there is no evidence upon which to conclude that she would have been awarded the position. Grievant does not explain why she believes she is entitled to a seniority date of 1980, and there is no basis upon which such relief may be granted.

Consistent with the foregoing findings of fact and discussion, it is appropriate to make the following conclusions of law.

Conclusions of Law

1. Under W. Va. Code §18-29-3(a) this Grievance Board has no authority to act upon a

Grievant's claim of entitlement to a default judgement at level three. Morrone v. Wayne CountyBd. of Educ., Docket No. 92-50-389 (Aug. 31, 1993); Chaffin v. Wayne County Bd. of Educ., Docket No. 92-50-419 (Aug. 20, 1993); Smith v. Bd. of Directors/West Liberty State College, Docket No. 93-BOD-051 (Feb. 17, 1993).

2. In matters involving a nondisciplinary issue, Grievant has the burden of proving each element of her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); Bell v. Lincoln County Bd. of Educ., Docket No. 97-22-013 (July 28, 1997); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997). See W. Va. Code §18-29-6.

3. Grievant has failed to prove that she is entitled to an adjustment of her seniority date from 1985 to 1980.

Accordingly, the grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Randolph County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate Court.

Date: December 29, 1997 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

The grievance was transferred to the undersigned Administrative Law Judge in October, 1997, for administrative reasons.

Grievant did not elect to file any post-hearing submissions.