MARYANN J. EHLE,

Grievant,

v. **DOCKET NO. 97-BOD-483**

BOARD OF DIRECTORS,

WEST LIBERTY STATE COLLEGE,

Respondent.

D E C I S I O N

On October 29,1997, Respondent West Liberty State College (WLSC) submitted the following matter to this Grievance Board at Level IV:

> Please be advised that Mary Ann Ehle (sic), a faculty member of West Liberty State College, is attempting to allege that the Institution is in default of the grievance procedure of W. V. Code 18-29 et seq. There has been no grievance filed and no process invoked or followed through lower levels as prescribed by the grievance procedure.
>
> Attached are copies of the only documents the Institution possesses, other than the notice of default received on Friday October 24, 1997, regarding this matter. As you can see Professor Ehle has not adhered to the underlying levels of the grievance procedure, yet the Institution is now faced with an allegation of default, which is procedurally and substantively flawed. However, to preserve its right to appeal an allegation of default, West Liberty State College requests and reserves its right to a hearing on this matter and presentation of a motion to dismiss prior to a hearing, if this honorable Board believes such hearing is necessary.

R Ex 1.

Subsequently, a Level IV hearing was conducted before Administrative Law Judge Jeffrey Weatherholt in this Grievance Board's office in Wheeling, West Virginia. The parties submitted post-

hearing arguments, and this matter became mature for decision upon receipt of Grievant's written submission on March 9, 1998. (See footnote 1) For administrative reasons, this matter was reassigned to the undersigned administrative law judge for decision.

The following Findings of Fact pertinent to resolution of this grievance have been determined based upon a preponderance of the credible testimonial and documentary evidence contained in the transcript of the Level IV hearing.

FINDINGS OF FACT

1. Maryann J . Ehle (Grievant) is employed by Respondent West Liberty State College (WLSC) as a Professor in the Department of Professional Education.

2. At all times pertinent to this grievance, Grievant's immediate supervisor was Dr. Suzanne Robbins, Chair of WLSC's Department of Professional Education.

3. On September 11, 1997, Grievant sent the following memo to Dr. Robbins:

> In accordance with Policy Number 244, I would [l]ike to request a pre level one conference meeting with you to discuss a possible grievance. The purpose of this meeting is to attempt to resolve the difficulty without initiating the formal grievance procedure.

R Ex 1.

4. WLSC Faculty Operational Policy Number 244, dated March 11, 1995, contains the following “Grievance Policy” relevant to this matter:

> Faculty shall have the option of pursuing grievances in accord with either the provisions of West Virginia Code, Chapter 18-29 or Board of Directors Policy Bulletin 36-16 in conjunction with the following procedures. Grievants will specify which grievance system they wish to use when they commence grieving. Changing systems is not permitted.
>
> The term “grievance shall mean a claim or complaint based on an event or condition which affects the welfare or condition of appointment of academic personnel and which does not involve causes for dismissal or termination of employment.
>
> 1. **Consultation:** Before an adjudicated resolution is sought, the grievant(s) and respondent(s) will make every effort to resolve the difficulty through consultation. If an agreement or compromise cannot be reached through consultation, a formal hearing

> may be requested. Before any hearing occurs, the appropriate adjudicator (or panel) will seek to effect a resolution via consultation. Resolutions so effected will be committed to writing, signed, and distributed to all parties at the request of either party.
>
> 2. **Hearing Levels:** In-house grievances may be heard in sequence by an appropriate chairperson or school dean and or by the Vice President/Academic Dean, a faculty panel and/or the President. The hearing level at which a grievance begins is determined by the position of the respondent(s). If the respondent is another faculty member, the initial request for a hearing will be addressed to the chairperson of the respondent.

R Ex 1 (emphasis in original).

5. Dr. Robbins received Grievant's September 11 memo on September 17, 1997, when she returned to her office.

6. On September 19, 1997, Dr. Robbins replied to Grievant's September 11 memo scheduling a conference on the matter for September 25, 1997. R Ex 2.

7. Grievant met with Dr. Robbins on September 25, 1997. Thereafter, Dr. Robbins sent Grievant the following memo dated September 26, 1997:

> Thank-you for meeting with me on 9-25-97 to discuss your concerns. As you expressed at our meeting, the concerns raised are the same concerns you addressed in your memo dated 8-29-97. You did not specify any new concerns which were not already indicated in the 8-29-97 memo, nor did you provide any new information regarding these concerns. Ourmeeting on 9-25-97 was the second time we had met to discuss these concerns, as these are the same concerns we had already discussed at a consultation meeting held on 9-4-97 with Dr. Rowe and Dr. Jones also in attendance. It was my understanding, as well as that of Drs. Rowe and Jones, that we had come to an agreement regarding these issues at that time.

R Ex. 3.

8. On October 8, 1997, Grievant prepared a grievance on a standard grievance form for grievances being filed in accordance with W. Va. Code §§ 18-29-1, et seq., attaching a two-page grievance statement, and naming Grace Norton as her representative. Grievant sent one copy to Dr. Robbins and another copy to WLSC's Human Resources Department by depositing each copy in a properly addressed envelope in the Campus Mail at WLSC.

9. Brian Warmuth, WLSC's Director of Human Resources, received a copy of the grievance on October 9, 1998. Dr. Robbins did not receive the copy of the grievance which was sent to her.

10. On or about October 9, 1997, Mr. Warmuth met with Dr. Robbins and provided her a copy of the grievance he had received. Mr. Warmuth also discussed his intended response with Dr. Robbins.

11. On October 10, 1997, Mr. Warmuth wrote to Grievant's representative, with a copy to Grievant, stating the following:

> I have enclosed the original copy of a written complaint received by this office on October 9, 1997.
>
> This statement of complaint is being returned to you for the following reasons:
>
> > I have attached a copy of a memorandum from Dr. Ehle dated September 11, 1997 which indicates that she selected the administrative procedure outlined in Faculty Policy # 244 and as provided for under Board Policy Bulletin # 36, section 16. You will note from the highlighted area on the enclosed copy of page one of Faculty Policy # 244 that once selected, an individual may not change procedures.
> >
> > Dr. Ehle has failed to name the respondent and level at which she is filing the instant complaint as outlined by Policy # 244[.]
>
> Please note that it is the College's position that because of, but not limited to the above reasons, the complaint has not been properly filed nor was it filed under the procedure previously identified and selected by Dr. Ehle.

R Ex 1.

12. On October 24, 1997, Grievant submitted a Notice of Default in accordance with W. Va. Code § 18-29-3(a), alleging that Dr. Robbins had failed to respond to her grievance at Level I within the time limits specified in W. Va. Code § 18-29-4(a). G Ex 1.

DISCUSSION

W. Va. Code § 18-29-3(a) provides in pertinent part:

> If a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required by 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 party is contrary to law or clearly wrong.

This Grievance Board has previously determined that it does not have jurisdiction to enforce a default by an employer that occurred at the lower levels of the grievance procedure, 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. Hopkins v. Raleigh County Bd. of Educ., Docket No. 96-41-432 (Feb. 26, 1998). See, e.g., Bennett v. Randolph County Bd. of Educ., Docket No. 96-42-234 (Dec. 29, 1997); Jerden v. Lewis County Bd. of Educ., Docket No. 93-21-349 (Aug. 19, 1994); Chaffin v. Wayne County Bd. of Educ., Docket No.92-50-419 (Aug. 20, 1993); Smith v. Bd. of Directors, Docket No. 93-BOD-051 (Feb. 17, 1993). However, should the employer appeal the employee's default declaration on the narrow grounds that the remedy received is contrary to law or clearly wrong, this Grievance Board has jurisdiction to decide such an appeal. Gruen v. Bd. of Directors, Docket No. 94- BOD-256 (Nov. 30, 1994); Wadbrook v. W. Va. Bd. of Directors, Docket No. 93-BOD-214 (Aug. 31, 1993); Flowers v. W. Va. Bd. of Trustees, Docket No. 92-BOT-340 (Feb. 26, 1993).

The instant matter is before this Grievance Board as the result of a limited appeal by Respondent in accordance with W. Va. Code § 18-29-3(a). Although the parties have made a number of disputed claims in their pleadings, the outcome of this matter is governed by Respondent's contention that any remedy would be clearly wrong because, in fact, no default occurred at the lower levels of the grievance procedure.

The facts in this matter, as established by a preponderance of the credible evidence of record, indicate that Grievant began pursuing a grievance with her immediate supervisor, Department of Professional Education Chair Dr. Suzanne Robbins, indicating that she was doing so “[i]n accordance with Policy Number 244.” R Ex 1. After a meeting with Dr. Robbins to discuss the grievance, Grievant then attempted to file a grievance in accordance with the procedure provided in W. Va. Code §§ 18-29-1, et seq. Although Dr. Robbins apparently did not receive her copy of the grievance through no fault of Grievant, the copy which Grievant sent to Respondent's Human Resources Department was received by Brian Warmuth, WLSC's Director of Human Resources. Mr. Warmuth then shared his copy of the grievance documents with Dr. Robbins, placing her on actual notice that a grievance had been filed at Level I. Within the time limits specified in W. Va. Code § 18-29-4(a)(4), Mr. Warmuth

responded in writing to Grievant and her representative indicating that the grievance had not been properly filed at Level I because Grievant had attempted to switch procedures contrary to the provisions of WLSC Policy 244. At that point, Grievant could have elected to proceed under Policy 244, or pursue her grievance under W. Va. Code §§ 18-29-1, et seq., by appealing to Level II. Grievant also had the option of responding to Mr. Warmuth stating her position that she believed she was entitled to a response from Dr. Robbins, or explaining her reasons for disputing his conclusion that she had elected to proceed under Policy 244. (See footnote 2) Instead, Grievant elected to declare a default, ostensibly because the Level I response she received did not originate with Dr. Robbins.

Adopting Grievant's position in this matter would require this Grievance Board to elevate form over substance to an absurd degree. As Director of Human Resources, Mr. Warmuth has authority to respond to grievances on behalf of WLSC. See Jenkins v. Bd. of Directors, Docket No. 96-BOD-034 (June 7, 1996). Moreover, whether Grievant's Level I response came from Dr. Robbins or Mr. Warmuth, it would have contained the same response. Indeed, there is no serious suggestion that Dr. Robbins would have rendered a response to the grievance which would have differed from Mr. Warmuth's letter in a significant regard. The grievance procedure for education employees is not so inflexible that a default may be declared because the official responding at Level I is someone with greater authority than the employee who would ordinarily function as the grievance evaluator at that level. See Hanlon v. Logan County Bd. of Educ., No. 23957 (W. Va. Sup. Ct. Nov. 20, 1997). See also Hattman v. Darnton, No. 23950 (W. Va. Sup. Ct. Dec. 12, 1997). At the very least, through the written response issued by Mr. Warmuth, WLSC substantially complied with the requirements of W. Va. Code § 18-29-3(a). See State ex rel. Caton v. Raleigh County Bd. of Educ., No. 24084 (W. Va. Sup. Ct. Nov. 21, 1997). Accordingly, Respondent's request for a determination that it is not in default under W. Va. Code § 18- 29-3(a) is granted. See Wadbrook, supra. This matter must be remanded to Level I. Grievant's right to appeal to Level II or pursue her grievance through the procedure authorized by WLSC Policy Number 244 shall commence to run from the date of her receipt of this decision.

In addition to the foregoing discussion, the following conclusions of law are appropriate in this matter:

CONCLUSIONS OF LAW

1. "If a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required by 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 party is contrary to law or clearly wrong." W. Va. Code § 18-29-3(a). 2. When the employer asserts that the remedy received is contrary to law in accordance with W. Va. Code § 18-29-3(a) because, in fact, no default occurred, the employer must establish such a defense by a preponderance of the evidence. See Gruen v. Bd. of Directors, Docket No. 94-BOD-256 (Nov. 30, 1994).

3. Assuming Grievant properly filed a grievance at Level I of the grievance procedure on October 8, 1997, the written response sent to Grievant and her designated representative on October 10, 1997, by Brian Warmuth, WLSC's Director of Human Resources, represented substantial compliance with the grievance procedure prescribed in W. Va. Code §§ 18-29-1, et seq., and WLSC may not be found to have been in default in accordance with W. Va. Code § 18-29-3(a) in the circumstances presented. See State ex rel. Caton v. Raleigh County Bd. of Educ., No. 24084 (W. Va. Sup. Ct. Nov. 21, 1997); Wadbrook v. W. Va. Bd. of Directors, Docket No. 93-BOD-214 (Aug. 31, 1993). See also Hattman v. Darnton, No. 23950 (W. Va. Sup. Ct. Dec. 12, 1997); Hanlon v. Logan County Bd. of Educ., No. 23957 (W. Va. Sup. Ct. Nov. 20, 1997).

Accordingly, Respondent's request for a determination of non-default under W. Va. Code § 18-29-3(a) is **GRANTED** and this matter is **REMANDED** for processing as previously indicated in this **DECISION**.

Any party may appeal this decision to the Circuit Court of Ohio County or the Circuit Court of Kanawha 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 StateEmployees 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.

LEWIS G. BREWER

ADMINISTRATIVE LAW JUDGE

Dated: May 14, 1998

Footnote: 1

Grievant was represented by Grace Norton, a faculty member at West Virginia Northern Community College. Respondent was represented by Senior Assistant Attorney General Mary Roberta Brandt.

Footnote: 2

Because this matter is before this Grievance Board pursuant to the default procedure, it is not necessary to decide whether Grievant initiated her grievance under Policy 244, or whether such an act precluded her from proceeding under the statutory grievance procedure. However, it appears that Grievant acted in substantial compliance with W. Va. Code § 18-29-4 up to the point when she received Mr. Warmuth's correspondence.