NORMA K. BOWYER,

Grievant,

v v.

Docket No. 99-BOT-197D

BOARD OF TRUSTEES/WEST VIRGINIA UNIVERSITY,

Respondent.

D E F A U L T O R D E R

Grievant, Norma K. Bowyer, was employed by the West Virginia Board of Trustees (Respondent) as Practicum Coordinator for the Master of Public Health Program at West Virginia University (WVU) until her appointment expired on September 30, 1998. Grievant proceeded to file a grievance under W. Va. Code §§18-29-1, et seq. A level one decision denying the grievance was issued on July 16, 1998, and Grievant appealed to level two. The level two hearing began on July 30, 1998, and eventually concluded on April 14, 1999. A level two decision was issued on May 12, 1999, and Grievant filed a complaint at level four on May 18, 1999, alleging that Respondent had defaulted. (See footnote 1) A hearing on the default issue was conducted on June 4, 1999, at which time Grievant was represented by Phillip D. Gaujot, Esq., and Respondent was represented by Samuel R. Spatafore, Assistant Attorney General. The matter became mature for decision with Grievant's final submission on July 6, 1999. Grievant cites W. Va. Code §18-29-4(b) which requires that the level two administrator or his or her designee shall conduct a hearing, and "shall issue a written decision within five days of such hearing." (Emphasis added). Grievant argues that the statutory language is mandatory, and that Respondent's delay of nearly a month clearly constitutes a default.

In response, Respondent denies that a default occurred because Russell K. Dean, Associate Provost of Curriculum and Instruction, and the level two hearing evaluator, advised Grievant at the conclusion of the hearing that he would hold the record open until he received and reviewed a transcript of the proceedings to determine whether he had any further questions. Mr. Dean testified at level four that Grievant had requested an expeditious decision, but stated no objection to his request.

Colleen Lankford, Supervisor of Respondent's Employee Relations Unit, testified that her office received the transcript on April 27, 1999, that copies were prepared on April 28, and mailed to counsel, and presumably the hearing evaluator, on April 29, 1999.

Grievant testified that she had stated objections to the ongoing delays during the level two hearing, but that she did not object to the evaluator's request to review the transcript.

Discussion

The issue of default in a grievance filed by an education employee is addressed in W. Va. Code §18-29-3(a), which provides in pertinent 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 ofsickness or illness, the grievant shall prevail by default.”

W. Va. Code §18-29-4(b) provides that “[w]ithin five days of receiving the decision of the immediate supervisor, the grievant may appeal the decision to the chief administrator, and such administrator or his or her designee shall conduct a hearing in accordance with section six [§18-29-6] of this article within five days of receiving the appeal and shall issue a written decision within five days of such hearing. . . .”

In this case, a written decision was not issued within five days of the conclusion of the hearing, and there is no assertion that the delay was directly due to illness or sickness. However, Mr. Dean's testimony that he requested an undefined period of time to review the transcript prior to rendering a decision, is accepted based upon the testimony of the parties, and because it is consistent with Respondent's practice in other grievance proceedings. See Wilson v. Bd. of Trustees/W. Va. Univ., Docket No.99-BOT-115D (May 13, 1999). Although it appears that Grievant may have anticipated the decision would be issued within five days of Mr. Dean's receipt of the transcript, it does not appear that her understanding was based on any representation by Mr. Dean, or that she expressed her expectation to him. If Mr. Dean received the transcript on April 30, 1999, the decision was issued eight work days later. This timeframe would allow him only three additional days to review a record of approximately three thousand pages. A delay of this duration, under these circumstances, is not unreasonable.

Suspension of the timelines is permitted by W. Va. Code §18-29-3(a) which states “[t]hat the specified time limits may be extended by mutual written agreement . . . .” Although the agreement in

this case was verbal, and unfortunately off the record, the evidence establishes substantial compliance with this provision. Grievant does not deny that she agreed to an extension of the timelines, she simply asserts that she expected the decision sooner than it was issued. As in Wilson, with no dates certain specified for the delay, it cannot now be determined that Respondent defaulted by failing to produce a level two decision within five days of the hearing, or even within five days of receipt of the transcript.

Accordingly, Grievant's request for a determination of default under W. Va. Code §18-29-3(a) is **DENIED**. This matter will remain on the Grievance Board docket and proceed to a level four hearing on the merits. The Grievance Board does not consider this Order to be a final order or decision which is appealable to circuit court under the provisions of W. Va. Code §18-29-7.

DATE: July 13, 1999

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Sue Keller

Senior Administrative Law Judge

Footnote: 1

Effective July 1, 1998, the West Virginia Legislature amended W. Va. Code §18-29- 5(1998) to state, "[t]he Board shall administer the grievance procedure . . . as provided for in section four of this article." Based upon this provision the Grievance Board has jurisdiction to hear a grievant's's claim seeking relief by default, based upon the employer's alleged procedural violation. Previously, the Board had held that it was without authority to enforce a default in the absence of a request by the employer for a hearing regarding the remedy. Jackson v. Hancock County Bd. of Educ., Docket No. 99-15-081D (May 5, 1999).