DOUG SKEENS,

Grievant,

v. Docket No. 99-22-171D

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

ORDER DENYING DEFAULT

On April 27, 1999, Doug Skeens, Grievant, submitted this appeal to Level IV of the grievance procedure, alleging Respondent had failed to issue a Level I decision within the time lines set forth in W. Va. Code § 18-29-4. He requested that the Lincoln County Board of Education ("LCBOE") be found in default pursuant to the provisions of W. Va. Code §18- 29-3(a).

On May 21, 1999, a telephonic pre-hearing conference was conducted to clarify the issues in this case, and the procedures that would be utilized at hearing. On June 3, 1999, a hearing was conducted before the undersigned Administrative Law Judge. (See footnote 1) **The parties agreed the undersigned would address the sole issue of whether Respondent was in default. The parties presented oral arguments, waiving written arguments, and this matter became mature for decision at the conclusion of the hearing.**

Issues and Arguments

Grievant alleges LCBOE is and has been in default on this grievance for many years, and requests he be given the relief he seeks in the form of monetary compensation. The original grievance alleged LCBOE violated W. Va. Code § 18A-4-8a when 45 minutes was added to his regular bus run without his consent. Respondent argues this grievance and the alleged default occurred prior to the change in the grievance procedure, and thus, the Grievance Board does not have jurisdiction to hear this default argument. Additionally, Respondent argues the issue of laches due to the length of time that has elapsed. Respondent notes it has

been harmed by the length of time that has passed since the original grievance was filed, and noted none of the administrators or the attorney involved in the original grievance and alleged oral agreement are currently employed by LCBOE.

The following findings of fact pertinent to resolution of the default issue have been determined based upon a preponderance of the credible testimonial and documentary evidence presented during the Level IV hearing.

Findings of Fact

1. This grievance was filed on November 5, 1995, with Grievant's supervisor, Johnny Adkins. At that time, Susan Hubbard was Grievant's representative.

2. As no response was received by November 27, 1995, Grievant advanced this grievance to Level II.

3. Then Superintendent Dallas Kelley remanded the grievance to Mr. Adkins for action at Level I, on December 6, 1995.

4. Although Ms. Hubbard discussed the grievance with Mr. Adkins, no response was received.

5. On January 18, 1996, Ms. Hubbard sent a letter to Superintendent Kelley notifying him LCBOE was in default. This letter referred to W. Va. Code § 18-29-3, andstated that because the response to the grievance had been untimely, "the grievant shall prevail by default." (See footnote 2) No response was received.

6. After sending the default letter, Ms. Hubbard discussed the situation with Superintendent Kelley. Superintendent Kelley indicated if the facts were as presented, and LCBOE owed Grievant money, it would be paid.

7. On May 28, 1996, Ms. Hubbard attended a LCBOE board meeting, and again complained no action had been taken on the grievance. LCBOE referred the issue to Superintendent Kelley for action.

8. Some time later, Ms. Hubbard's supervisor, Kathy Smith, met with LCBOE's attorney Charles Damron, (See footnote 3) and he stated the grievance would be settled, and he would do the paperwork. LCBOE did not affirm it was in default. As Grievant believed an oral agreement had been reached, he took no further action on his grievance. (See footnote 4)

9. Sometime thereafter, Superintendent Kelley left the employ of LCBOE. (See footnote 5)

10. Ms. Hubbard also discussed the matter with Mr. Charles McCann, a top level administrator. It was unclear from the testimony what the result of this meeting was. 11. In the Spring of 1997, Ms. Hubbard was transferred to other counties, and Ms. Anita Mitter became Grievant's representative. Grievant frequently contacted Ms. Mitter about the resolution of his grievance. Ms. Mitter contacted Mr. Damron about this grievance.

12. Sometime thereafter, Mr. Damron left the employ of LCBOE. (See footnote 6) Since Mr. Damron had taken some files when he left, it is possible Grievant's file was not available.

13. Mr. Erwin Conrad was LCBOE's attorney for a while after Mr. Damron's departure. Grievant unsuccessfully attempted to contact Mr. Conrad about this grievance, but was never able to speak to him. Grievant also contacted Ms. Birdie Gandee, LCBOE's treasurer. She informed Grievant she had no paperwork directing her to issue a check for him; and thus, she would not be able to pay him. The dates of both of these events are unclear.

14. On October 14, 1998, Ms. Mitter wrote LCBOE's then attorney, James Gabehart, and sent him a copy of the grievance form. Mr. Gabehart was not aware of the grievance prior to this time. Again, Grievant declared default, and Ms. Mitter requested payment by November 1, 1998.

15. On February 19, 1999, Ms. Mitter again wrote Mr. Gabehart, and proposed a settlement agreement. Ms. Mitter requested Grievant "be paid $10.00 a day for 180 days[,] plus 10% interest for the school years 95-96, 96-97, 97-98, 98-99, for a total of 40% interest." 16. Grievant appealed this case to Level IV on April 27, 1999.

Discussion

The first issue to address is LCBOE's argument that this Grievance Board is without jurisdiction to rule on the default claim, as default occurred and was declared prior to the change in W. Va. Code § 18-29-3(a). Some history about the statute, the Grievance Board's position on jurisdiction over defaults, both before and after the changes, and a discussion of recent rulings should be helpful in understanding LCBOE's argument, and the ruling of the undersigned Administrative Law Judge.

The default provision applicable to school personnel grievances, enacted in 1992, is

contained in W. Va. Code § 18-29-3(a), which states 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 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. In making a determination regarding the remedy, the hearing examiner shall presume the employee prevailed on the merits of the grievance and shall determine whether the remedy is contrary to law or clearly wrong in light of the presumption. If the examiner finds that the remedy is contrary to law, or clearly wrong, the examiner may modify the remedy to be granted so as to comply with the law and to make the grievant whole.**

This Grievance Board had held the position for many years that it was without jurisdiction, under the education grievance procedure, to decide default matters when the employee appealed to Level IV claiming the employer had defaulted. See Smith v. Bd. of Directors, Docket No. 93-BOD-051 (Feb. 17, 1993). The ruling in Smith was based upon the finding that the Grievance Board was without authority to administer the lower levelsof the grievance procedure, and had no authority to enforce a default, in the absence of a request for a hearing regarding the default remedy, filed by the employer.

However, effective July 1, 1998, the West Virginia Legislature gave the Grievance Board authority to administer levels two and three of the grievance procedure for education employees. W. Va. Code § 18-29-5 (1998) provides that "[t]he Board shall administer the grievance procedure . . . as provided for in section four of this article." Based upon this change in the statute, the Grievance Board, in Jackson v. Hancock County Board of Education, Docket No. 99-15-081D (May 5, 1999), ruled it now had jurisdiction to hear and decide a grievant's default claim which was based on the employer's alleged procedural violation of failing to respond to the grievance within the time limits contained in W. Va. Code § 18-29-4. Smith and its progeny which had reached a different conclusion, were overruled by Jackson. Clearly, this ruling indicates the Grievance Board has jurisdiction to rule on default issues raised after July 1, 1998.

Grievant declared LCBOE was in default on January 18, 1996. If Grievant had brought a default claim to the Grievance Board at that time, the parties would have been directed to the circuit court for resolution of the issue. Given that the Code Section was enacted in July 1,

1998, and the ruling in Jackson was in May 1999, it is clear that at the time Grievant declared default, the Grievance Board was without the prerequisite jurisdiction to resolve the issue of default.

However this statement does not end the inquiry into this issue. It is a well-settled principle of statutory construction in this state that a statute is presumed to operate prospectively, unless retroactive applicability is clearly expressed or necessarily impliedfrom the statute's language. Syl. Pt. 3, Shanholtz v. Monongahela Power Co., 165 W. Va. 305, 270 S.E.2d 178 (1980); See Conley v. Workers' Compensation Div./Hercules, 199 W. Va. 196, 483 S.E.2d 542 (1997); W. Va. Code § 2-2-10(bb) (1989). However, statutes which are merely procedural, rather than substantive, in nature may be retroactively applied. Shanholtz, supra. In Syllabus Point 2, Public Citizen, Inc. v. First National Bank in Fairmont, 198 W. Va. 329, 480 S.E.2d 538 (1996), the Supreme Court of Appeals of West Virginia stated, "[a] statute that diminishes substantive rights or augments substantive liabilities should not be applied retroactively to events completed before the effective date of the statute . . . unless the statute provides explicitly for retroactive application." See generally, Conley, supra; State ex rel. Blankenship v. Richardson, 196 W. Va. 726, 474 S.E.2d 906 (1996). Thus, in this situation, an initial determination must be made as to whether the change in the statute in question affects procedural or substantive rights. Jenkins-Martin v. Bureau of Employment Programs, Docket No. 98- BEP-285 (Sept. 24, 1998); Dismissal Order, Sharifpour v. W. Va. Dep't of Transp./Div. of Highways, Docket No. 98-DOH-265 (Sept. 9, 1998).

> **Black's Law Dictionary 997 (6th ed. 1991), defines "substantive law" as:**
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> > **That part of law which creates, defines, and regulates rights and duties of parties, as opposed to "adjective, procedural, or remedial law" which prescribes [the] method of enforcing the rights or obtaining redress for their invasion. The basic law of rights and duties . . . as opposed to procedural law . . . .**

The change in W. Va. Code § 18-29-5 is procedural in nature, as it merely altered the forum where a default could be filed. The change addressed "[the] method of enforcing the rights or obtaining redress" and did not affect substantive rights. Grievants could now come to Level IV, instead of the more expensive procedure of filing in circuit court. It isnoted that education grievants have been entitled to seek default for many years. (See footnote 7) **Because this**

change is procedural in nature, it may be applied retroactively, and Grievant has the right to seek default at the Grievance Board at this time. **(See footnote 8)** **This determination certainly makes sense, given the time that has passed since the filing of the grievance.**

Respondent also argues laches should be applied to this grievance. "Laches is a delay which operates prejudicially to another person's rights. A party must exercise diligence when seeking to challenge the legality of a matter involving a public interest, such as the manner of the expenditure of public funds. Failure to do so constitutes laches. Maynard v. Board of Education of Wayne County, 357 S.E.2d 246, 255 (W. Va. 1987)." COL No. 3, Buchanan v. Bd. of Directors/Concord College, Docket No. 94-BOD-078 (Nov. 30, 1994). Laches occurs when an individual sleeps on his rights or neglects to assert a right of which she is aware. Black's Law Dictionary 435 (5th abr. ed. 1983). Knowledge, unreasonable delay, and change of position are the essential elements of laches. Id. Although Grievant could have been more persistent in seeking his default judgement, it is clear he believed this grievance was resolved, and no further action was needed. Much of the delay was created by LCBOE's failure to act, even when they were reminded the issue was still pending. Thus, laches will not apply to this decision on default.

From the facts presented to the undersigned Administrative Law Judge, it is clear LCBOE was in default, and Grievant's request for default must be granted. It is noted a situation with this type of lengthy delay does not happen often, and much of the delay in this case was due to the numerous changes in personnel, especially with the school system, but also with Grievant's representation.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. Prior to the Legislative changes in W. Va. Code § 18-29-5, giving this Grievance Board control over the lower levels of the grievance procedure in July 1, 1998, this Grievance Board was without jurisdiction to resolve issues of default on an appeal filed by an employee.

2. Since the 1998 amendment of W. Va. Code § 18-29-5, this Grievance Board has the jurisdiction to address the issue of default at Level IV on an employee's appeal.

3. Because the change in W. Va. Code § 18-29-5 was procedural in nature, only affecting

where a default may be filed, it may be applied retroactively, and this Grievance Board may consider the issue of default in this case.

4. Grievant has proven LCBOE did not respond in a timely manner, and is in default on this grievance. Accordingly, the request to grant default is GRANTED. As agreed to by the parties, the next issue will be considered separately by the undersigned Administrative Law Judge, and will resolve whether the relief sought by Grievant is clearly wrong or contrary to law.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of the Lincoln County. Any 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. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the GrievanceBoard. The appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: August 20, 1999

Footnote: 1 ***Grievant was represented by Anita Mitter from the West Virginia Education Association, and the Board was represented by Attorney James Gabehart.***

Footnote: 2 ***Ms. Hubbard indicated LCBOE routinely had difficulty meeting the time lines, both on grievances and on promised payments, so she attempted to be lenient in these situations.***

Footnote: 3 ***Superintendent Kelley may also have been at this meeting.***

Footnote: 4 ***Ms. Hubbard had a good working relationship with Superintendent Kelley and believed this grievance was resolved.***

Footnote: 5 ***The parties were unable to clarify this date any further.***

Footnote: 6 ***It is also noted that Mr. Adkins is currently incarcerated.***

Footnote: 7 ***"In order to benefit from the 'relief by default' provisions contained in W. Va. Code § 18-29-3(a) (1992) (Repl. Volunteer. 1994), a grieved employee or his/her representative must raise the 'relief by default' issue during the grievance proceedings as soon as the employee or his/her representative becomes aware of such default." Syl. Pt. 4, Hanlon v. Logan County Bd. of Educ., 201 W. Va 496, 305 S.E.2d 447 (1997). This requirement was met by Ms. Hubbard's letter of January 18, 1996.***

Footnote: 8 ***The ruling in this case can easily be distinguished from Sharipour, supra, and Jenkins-Martin, supra. These cases dealt with the recently enacted default provisions for state employees. A change in the state grievance statute in July 1998, gave state employees the right to allege default for the first time, and this resulted in a substantive change which created a right not previously possessed by state employees.***