DOUG SKEENS,

Grievant,

v. Docket No. 99-22-171

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N ON D E F A U L T

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 the Lincoln County Board of Education ("LCBOE") be found in default pursuant to the provisions of W. Va. Code § 18- 29-3(a). (See footnote 1) **The original grievance was filed on November 11, 1995, and stated:**

> **Violation of WV Code 18A-4-8a in regard to the additional time bus route from Attensville Elementary to Sand Creek for Grievant. RELIEF SOUGHT: Relief sought is to be compensated for the additional time or have the bus route reinstated as scheduled on bid.**

Following a hearing on June 3, 1999, the undersigned Administrative Law Judge issued an Order Granting Default on August 20, 1999, finding LCBOE had failed to respond in a timely manner to the grievance at Levels I and II. That Order is incorporated into this decision and attached as Appendix A. At the Level IV hearing, limited evidence on the merits of the case was also presented, even though the sole purpose of that hearing was the issue of default. The parties had agreed to return for a hearing on July 29, 1999, for the presentation of evidence on the merits of the case. Later, the parties informed theundersigned Administrative Law Judge they wished to stand on the evidence presented at this prior hearing and to submit written proposed Findings of Fact and Conclusions of Law. Thus, this case became mature for decision on August 16, 1999, after receipt of the parties' submissions.

The following findings of fact pertinent to resolution of this grievance have been

determined based upon a preponderance of the limited, credible testimonial and documentary evidence presented during the Level IV hearing.

Findings of Fact

1. Grievant is employed as a bus operator with LCBOE.

2. After the start of the 1995-1996 school year, Grievant's run was increased by an additional 45 minutes without his written agreement.

3. At the time this change was made to Grievant's run, it was the practice of LCBOE to pay bus operators additional money for any change greater than 30 minutes. (See footnote 2)

4. Grievant filed this action on November 5, 1995, and received no response from LCBOE. On August 20, 1999, this Grievance Board ruled LCBOE had defaulted on the grievance pursuant to W. Va. Code § 18-29-3(a). See Appendix A.

5. Grievant informed LCBOE it was in default on January 18, 1996, and subsequently, Grievant believed he had a verbal agreement with LCBOE. 6. No settlement was forthcoming, and the next written documentation of action by Grievant was an October 14, 1998 letter written by his representative in which Grievant again declared default.

7. On February 19, 1999, Ms. Mitter again wrote Mr. Gabehart, LCBOE's attorney, 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."

Discussion

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.

Once a respondent has been found to be in default, it has the burden of establishing by a preponderance of the evidence that the remedy requested is contrary to law or clearly wrong. See Hoff v. Bd. of Trustees, Docket No. 93-BOT-104 (June 30, 1994); Flowers v. W. Va. Bd. of Trustees, Docket No. 92-BOT-340 (Feb. 26, 1993). See also Parsons v. Div. of Corrections, Docket No. 99-CORR-056D2 (July 19, 1999);Williamson v. W. Va. Dep't of Tax and Revenue, Docket No. 98-T&R-275D2 (Jan 6, 1999). In the instant case, Grievant is requesting additional daily compensation for the rest of the school year he completed his run with the required, additional time.

W. Va. Code § 18A-4-8a provides, in pertinent part:

> **No service employee may have his or her daily work schedule changed during the school year without the employee's written consent . . . .**

Slight alterations of a bus operator's driving schedule during a school year may be necessary due to need. Smith v. Lewis County Bd. of Educ., Docket No. 21-88-043-3 (Dec. 30, 1988). Such alterations are not per seniority violations of W. Va. Code § 18A-4- 8a, and such alterations must be analyzed on a case by case basis. Roberts v. Lincoln County Bd. of Educ., Docket No. 92-22-131 (Aug. 31, 1992). A county board of education must have freedom to make at least reasonable, small changes to a bus operator's daily work schedule within the parameters of his contract, many of which cannot reasonably be effected until shortly before school starts for pupils in any given year, at the earliest. Froats v. Hancock County Bd. of Educ., Docket No. 89-15-414 (Dec. 18, 1989).

In the instant case, it cannot be found that an addition of 45 minutes to Grievant's bus route is a “slight alteration” which would be excepted from the prohibition against change set forth in W. Va. Code § 18A-4-8a. Runyon and Skeens v. Lincoln County Bd. of Educ., Docket No. 97-22-479 (Feb. 6, 1998). Thus, the relief sought cannot be seen as clearly wrong or contrary to law.

However, Respondent has raised the issue of laches and avers it must be applied to this grievance which was begun in 1995. "Laches is a delay which operates prejudiciallyto 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 he 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 this default judgement, it is clear he believed this grievance was resolved, and no further action was needed. As stated in the Order Granting Default, most 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 be applied to the issue of Grievant's relief, as it would be inequitable to apply that doctrine in these circumstances.

Additionally, the relief ordinarily provided to a grieving employee under the education grievance procedure, W. Va. Code §§ 18-29-1, et seq., involves a "make-whole" remedy, intended to restore the employee to his or her rightful place as an employee. See W. Va. Code § 18-29-5(b); Graf v. W. Va. Univ., 189 W. Va. 214, 429 S.E.2d 496 (1992); Sanders v. Putnam County Bd. of Educ., Docket No. 97-40-459 (Dec. 3, 1997). See also W. Va. Dep't of Natural Resources v. Myers, 191 W. Va. 72, 443 S.E.2d 229 (1994); Monteith v. Bd. of Educ., 180 W. Va. 31, 375 S.E.2d 209 (1988). See generally Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Newman v. Piggie Park Enterprises, 390 U.S.400 (1968); W. Va. Inst. of Technology v. W. Va. Human Rights Comm'n, 181 W. Va. 525, 383 S.E.2d 490 (1989). Thus, interest is appropriate in this grievance.

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

Conclusions of Law

1. W. Va. Code § 18-29-3(a), 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.**

2. Once a respondent has been found to be in default, it bears the burden of establishing by a preponderance of the evidence that the remedy requested is contrary to law or clearly wrong. See Hoff v. Bd. of Trustees, Docket No. 93-BOT-104 (June 30, 1994); Flowers v. W. Va. Bd. of Trustees, Docket No. 92-BOT-340 (Feb. 26, 1993). See also Parsons v. Div. of Corrections, Docket No. 99-CORR-056D2 (July 19, 1999); Williamson v. W. Va. Dep't of Tax and Revenue, Docket No. 98-T&R-275D2 (Jan 6, 1999).

3. W. Va. Code § 18A-4-8a provides, in pertinent part:

> **No service employee may have his or her daily work schedule changed during the school year without the employee's written consent. . .**

4. Slight alterations of a bus operator's driving schedule during a school year may be necessary due to need. Smith v. Lewis County Bd. of Educ., Docket No. 21-88- 043-3 (Dec. 30, 1988). Such alterations are not per seniority violations of W. Va. Code § 18A-4-8a; such alterations must be analyzed on a case by case basis. Roberts v. Lincoln County Bd. of Educ., Docket No. 92-22-131 (Aug. 31, 1992).

5. A county board of education must have freedom to make at least reasonable, small changes to a bus operator's daily work schedule within the parameters of his contract, many of which cannot reasonably be effected until shortly before school starts for pupils in any given year, at the earliest. Froats v. Hancock County Bd. of Educ., Docket No. 89-15-414 (Dec. 18, 1989).

6. Respondent has failed to establish that the remedy sought by Grievant is clearly wrong or contrary to law.

7. Ordinarily, the relief provided to a grieving employee under the education grievance procedure, W. Va. Code §§ 18-29-1, et seq., involves a "make-whole" remedy, intended to restore the employee to his or her rightful place as an employee. See W. Va. Code § 18-29-5(b); Graf v. W. Va. Univ., 189 W. Va. 214, 429 S.E.2d 496 (1992); Sanders v. Putnam County

Bd. of Educ., Docket No. 97-40-459 (Dec. 3, 1997). See also W. Va. Dep't of Natural Resources v. Myers, 191 W. Va. 72, 443 S.E.2d 229 (1994); Monteith v. Bd. of Educ., 180 W. Va. 31, 375 S.E.2d 209 (1988). See generally Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968); W. Va. Inst. of Technology v. W. Va. Human Rights Comm'n, 181 W. Va. 525, 383 S.E.2d 490 (1989). Thus, interest is appropriate in this grievance. Accordingly, this grievance is GRANTED. LCBOE ORDERED to compensate Grievant for the additional time spent driving his bus route during the 1995-1996 school year. As the document relied upon by Grievant to support his testimony about the amount usually paid during that time was not presented into evidence, the undersigned Administrative Law Judge directs the parties to pay Grievant the amount of three fourths (3/4) or 45 minutes of an hour of his daily wage during the 1995-1996 school year for the number of days he had the additional 45 minutes added to his run. Additionally, in accordance with this decision, the LCBOE is directed to award prejudgment interest at the statutory rate (W. Va. Code § 56-6-31) on this amount.

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 Grievance Board. 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 31, 1999

Footnote: 1

Initially, Grievant was represented by Susan Hubbard and later by Anita Mitter from the West Virginia

Education Association, and the Board was represented by Attorney James Gabehart.

Footnote: 2

Grievant testified to this agreement, but it was not submitted into evidence. As is noted in the Default Order, the administrators and attorneys for LCBOE have changed, and it was difficult for LCBOE to respond to this testimony.