JESSE MULLINS,

Grievant,

v. **Docket No. 01-20-038D**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

ORDER DENYING DEFAULT

On February 13, 2001, Respondent, Kanawha County Board of Education ("KBOE"), requested a hearing at Level IV on a default claimed by Grievant, Jesse Mullins, on February 5, 2001. A pre-hearing telephonic conference was held on March 6, 2001, at which time it was decided that a hearing would be held solely on the issues of whether a default occurred and whether Respondent had a statutory excuse to the default claim. If the undersigned found a default and no statutory excuse, then a second hearing would be held to determine whether the relief requested was clearly wrong or contrary to law. The Level IV hearing was held on March 13, 2001. Grievant was represented by Steve Angel and Rosemary Jenkins, and KBOE was represented by James Withrow, Esquire. The parties elected not to file written argument, and this matter became mature for decision at the conclusion of the hearing.

The default provision for education employees is found in W. Va. Code § 18-29- 3(a), which provides:

> A grievance must be filed within the times specified in section four of this article and shall be processed as rapidly as possible. The number of days indicated at each level specified in section four of this article shall be considered as the maximum number of days allowed and, if a decision is not rendered at any level within the prescribed time limits, the grievant may appeal to the next level: Provided, That the specified time limits may be extended by mutual written agreement and shall be extended whenever a grievant is not working because of such circumstances as provided for in section ten, article four, chapter eighteen-a of this code. Any assertion by the employer that the filing of the grievance at level one was untimely must be asserted by the employer on behalf of the employer at or before the level two hearing. 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 that 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.

Effective July 1, 1998, W. Va. Code § 18-29-5 was amended to provide that the Grievance Board "shall administer the grievance procedure at levels two, three and four, . . . as provided for in section four of this article . . .." Based upon this provision, the Grievance Board now has jurisdiction to hear an education employee's default claim, when the default occurs at levels two or three. Jackson v. Hancock County Bd. of Educ., Docket No. 99-15-081D (May 5, 1999). This includes a contention by the employer that "any remedy would be clearly wrong because, in fact, no default occurred at the lower levels of the grievance procedure." Ehle v. Bd. of Directors, Docket No. 97-BOD-483 (May 14, 1998).

Grievant claims a default occurred at Level II when the decision was not issued in a timely manner.

W. Va. Code § 18-29-4(b) provides that, at Level II:

> Within 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 of this article within five days of receiving the appeal and shall issue a written decision within five days of such hearing. Such decision may affirm, modify or reverse the decision appealed from.

The burden of proof is upon the respondent claiming no default has occurred, or asserting an affirmative defense, to prove the same by a preponderance of the evidence, due to the presumption set forth in W. Va. Code § 18-29-3(a) that the grievant has prevailed on the merits. Ehle, supra. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

The following findings of fact are derived from the record developed at the Level IV hearing.

Findings of Fact

1. Two days of hearing were held on this grievance at Level II, on February 28, and September 11, 2000. At the conclusion of the Level II hearing on September 11, 2000, the parties agreed to allow the grievance evaluator, Caroline Cloer, ten days from receipt of the hearing transcript to issue her decision.

2. The Level II transcript was certified by the court reporter on September 20, 2000, and all parties and the grievance evaluator received it a few days later.

3. Ms. Cloer is a KBOE employee. She underwent surgery and was off work on sick leave from September 20, through October 31, 2000, and again from December 14, 2000, to March 1, 2001. During this time, the parties did not enter into a written agreement extending the time for issuing a decision.

4. Grievant's representative, Ms. Jenkins, discovered in late December of 2000, that she had not received a Level II decision in this grievance. She telephoned William Courtney, KBOE's Director of Employee Relations, to ask if a decision had been issued. Mr. Courtney and Ms. Jenkins have worked together to try to resolve and otherwise deal with grievances on a frequent basis for a number of years. Ms. Jenkins was aware that Ms. Cloer had been ill, and Mr. Courtney reminded her of this. Mr. Courtney told Ms. Jenkins they would work on it, and would get a decision out as soon as they could. Ms. Jenkins did not object to this. She called several times thereafter and was always told they were working on it. She would respond, “get it to me when you can.”

5. Mr. Courtney believed he had an understanding with Ms. Jenkins about the situation, and when a decision would be issued, based upon their working relationship, which was generally cooperative.

6. By the beginning of February 2001, Mr. Courtney had drafted the decision, but had not asked Ms. Cloer to review it. He was advised that Grievant had contacted the President of the KBOE about wanting a decision, and he called Ms. Cloer to see how she was feeling, and then took the decision he had drafted to Ms. Cloer's house for her to review and sign. She signed the decision on February 8, 2001, and it was placed in the mail to Grievant on February 9, 2001.

7. November 7, 10, 23, and 24, 2000, were holidays.

Discussion

Although the parties agreed that a Level II decision had to be issued within ten days of receipt of

the transcript, Ms. Cloer's illness extended the decision time even further, pursuant to the provision in W. Va. Code § 18-29-3(a), which tolls the timelines when the grievance evaluator is prevented from issuing a decision due to illness. When Ms. Cloer returned from sick leave on November 1, 2000, by agreement of the parties, she had ten working days to issue her written decision. Excluding holidays and week-ends, the decision was due on November 17, 2000. None of the witnesses called to testify could explain why Ms. Cloer did not issue her decision by this date.

The question is whether Ms. Jenkins' subsequent acquiescence to the continued delay waived the default. Grievant claims that the default occurred when the decision was not issued by November 17, 2000, and what Ms. Jenkins later did is of no relevance.

Certainly, if the parties had executed a written agreement waiving the timelines when Ms. Jenkins called in December 2000, as is provided for in W. Va. Code § 18-29- 3(a), the default claim would have to fail. It is not necessary to reduce the agreement waiving the timelines to writing if the parties have verbally agreed, or the Grievant's actions constitute a waiver of the statutory time requirements. Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995); Bowyer v. Bd. of Trustees, Docket No. 99- BOT-197D (July 13, 1999). See also, Hanlon v. County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997). The timelines were extended in this matter by Ms. Jenkins when she responded to Mr. Courtney to get the decision to her when he could. No default occurred under the facts of this case.

In addition, it is appropriate to make the following conclusions of law.

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 in this article, unless prevented from doing so directly as a result of sickness or illness, the grievant shall prevail by default." W. Va. Code § 18-29-3(a).

2. The burden of proof is on a respondent appealing a claim of default to Level IV to prove by a preponderance of the evidence that no default occurred, or that it has a statutory excuse for noncompliance with the statutory timelines, due to the presumption set forth in W. Va. Code § 18-29-3(a) that the grievant has prevailed on the merits. Ehle v. Bd. of Directors, Docket No. 97-BOD-483 (May 14, 1998).

3. The statutory timelines may be extended by mutual agreement, or by the actions of the

parties. Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995); Bowyer v. Bd. of Trustees, Docket No. 99-BOT-197D (July 13, 1999).

4. Respondent proved no default occurred, as the timelines for issuance of the Level II decision were extended by agreement of the parties, and Grievant, by his representative's actions, waived his right to assert a default occurred under these circumstances.

Accordingly, the default claim is **DENIED**. This matter should be, and the same hereby is, **ORDERED REMANDED TO LEVEL III** of the grievance procedure for education employees for proper adjudication. This matter is **ORDERED DISMISSED** and **STRICKEN** from the docket of this Grievance Board.

BRENDA L. GOULD

Administrative Law Judge

Dated: April 10, 2001