RICHARD BLOOMFIELD,

Grievant,

v. **Docket No. 01-35-554D**

OHIO COUNTY BOARD OF EDUCATION,

Respondent.

DECISION DENYING DEFAULT

Grievant, Richard Bloomfield, employed by the Ohio County Board of Education (OCBE) as a substitute bus operator, filed a level one grievance on September 6, 2001, in which he alleged that he was “wrongfully taken off bus #52". For relief, he requested back pay with interest, and seniority. Transportation Director James Freeland placed a level one decision on the bus Grievant was driving on September 25, 2001. Grievant notified OCBE that the response was untimely, and OCBE requested a level four hearing on the issue. A hearing on the default claim was conducted on November 27, 2001, at the Grievance Board's Wheeling office. Grievant was represented by Jeffrey D. Cramer, Esq., Berry, Kessler, Crutchfield & Taylor, and Gary Kestner of the United School Service Employees Association. OCBE was represented by General Counsel Kathy M. Finsley. The matter became mature for decision at the close of the hearing after both parties waived the opportunity to file proposed findings of fact and conclusions of law.

The following facts of this matter are undisputed.

Findings of Fact

1. Grievant has been employed by OCBE as a substitute bus operator since 1998, when he was offered the assignment of driving Route 52. Grievant held this substitute assignment from January 1998 until the end of the school year. 2. During the 1998-1999 school year, Route 52 was assigned to another substitute bus operator.

3. During the 1999-2000 and 2000-2001 school years, the assignment was given to a third substitute employee.

4. Grievant filed a level one grievance with OCBE Transportation Director James Freeland on September 6, 2001, following an informal conference held on September 4, 2001.

5. Mr. Freeland produced a written level one decision stating that he was “unable to render a

decision", dated September 18, 2001.

6. Mr. Freeland left the decision with his secretary for delivery, and was out of town on September 18 and 19, 2001. He was absent on September 20, 2001, due to an illness in the family, and returned to work on September 21, 2001.

7. On September 25, 2001, Mr. Freeland learned that the secretary forgot to deliver the decision, and he placed the document on the bus Grievant was driving that day.

8. Grievant's counsel filed a claim of default with OCBE by letter dated October 18, 2001.

Discussion

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 time lines, due to the presumption set forth in W. Va. Code § 18-29-3(a) that the grievant has prevailed on the merits. Jones v. Dep't of Educ., Docket No. 99-DOE-495D (Jan. 3, 2000); Tignor v. Dep't of Educ.,Docket No. 99-DOE-468D (Dec. 30, 1999); Ehle v. Bd. of Directors, Docket No. 97-BOD-483 (May 14, 1998).

A default claim is 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. The default provision applicable to school personnel grievances, enacted in 1992, is contained in W. Va. Code § 18-29-3(a), and 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 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.

W. Va. Code § 18-29-4(a) provides the following directions regarding when Respondent must act at level one:

1) Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

The conference with the immediate supervisor concerning the grievance shall be conducted within ten days of the request therefor, and any discussion shall be by thegrievant in the grievant's own behalf or by both the grievant and the designated representative.

(2) The immediate supervisor shall respond to the grievance within ten days of the conference.

(3) Within ten days of receipt of the response from the immediate supervisor following the informal conference, a written grievance may be filed with said supervisor, or in the case where the grievance involves an event under the jurisdiction of a state institution of higher education, the grievance shall be filed with said supervisor and the office of personnel, by the grievant or the designated representative on a form furnished by the employer or agent.

(4) The immediate supervisor shall state the decision to such filed grievance within ten days after the grievance is filed.

It should be noted that this Grievance Board has been directed in the past that "the grievance process is intended to be a fair, expeditious, and simple procedure, and not a 'procedural quagmire.'" Harmon v. Fayette County Bd. of Educ., Docket No. 98-10-111 (July 9, 1998), citing Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 393 S.E.2d 739 (1990), and Duruttya v. Bd. of Educ., 181 W. Va. 203, 382 S.E.2d 40 (1989). See Watts v. Lincoln County Bd. of Educ., Docket No. 98-22-375 (Jan. 22, 1999). The grievance procedure should not become a trap for either the employees or employers, but rather it should work so that disputes are resolved consistently and fairly, as early as possible within the procedure. See W. Va. Code § 18-29-1. Additionally, Spahr, supra, indicates the merits of the case are not to be forgotten. Id. at 743. See Edwards v. Mingo County Bd. of Educ., Docket No. 95-29-472 (Mar. 19, 1996).

In evaluating whether a default has occurred, it must also be kept in mind that "[t]he principle is

well founded that courts look with disfavor on judgments obtained by default." Intercity Realty Co. v. Gibson, 154 W. Va. 369, 376, 175 S.E.2d 452, (1970). Thompsonv. Bd. of Directors/W. Va. State College, Docket No. 97-BOD-117 (Apr. 30, 1998). If any doubt exists as to whether relief should be granted, such doubt should be resolved in favor of setting aside the default judgment in order that the case may be heard on the merits. McDaniel v. Romano, 155 W. Va. 875, 878, 190 S.E.2d 8, 11 (1972). The law strongly favors an opportunity for the defendant to make a case to an action against him. Intercity Realty Co. v. Gibson, supra. Finally, consideration should be given to: (1) the degree of prejudice suffered by the plaintiff from the delay in answering; (2) the presence of material issues of fact and meritorious defenses; (3) the significance of the interests at stake; and (4) the degree of intransigence on the part of the defaulting party. See Syl. Pt. 3, Parsons v. Consolidated Gas Supply Corp., 163 W. Va. 464, 256 S.E.2d 758 (1979); Thaxton v. Div. of Veteran's Affairs, Docket No. 98-VA-416D (Dec. 30, 1998).

OCBE concedes that the decision was delivered past the statutory time lines, but asserts the delay was due to excusable neglect, i.e., Mr. Freeland was out of town two days and there was an illness in his family on September 20. W. Va. Code § 18-29-3(a) limits cause for delay to sickness or illness, and does not include situations which would constitute excusable neglect. However, even considering the family illness of one day, the decision was still untimely. In fact, sickness or illness did not cause the delay since Mr. Freeland signed the decision on September 18, 2001. The true reason for the failure to issue a level one decision in a timely manner was that the secretary forgot to deliver it. This situation must be considered together with OCBE's claim that the default issue is moot because it was not timely raised. Grievant's counsel notified OCBE of the default claim by letter dated October 18, 2001, seventeen or eighteen days working days after thelevel one decision was issued. (See footnote 1) In order to benefit from the "relief by default" provisions contained in W. Va. Code § 18-29-3(a) (1992) (Repl. Vol. 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. Hanlon v. Logan County Bd. of Educ., 201 W. Va.305, 496 S.E.2d 447 (1997). Grievant testified that he understood he was to receive a response within ten days. Grievant offered no explanation for the delay in claiming a default. While it is clear that counsel was obtained during this period of time, Grievant and his union representative were obligated to preserve his rights in the interim.

Given the above discussion and the directions from the West Virginia Supreme Court of Appeals, it is clear that while OCBE did not issue a level one decision within the statutory time frames, neither did Grievant assert a claim for default in a timely manner. Therefore, a finding of default cannot be made in 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 astatutory excuse for noncompliance with the statutory time lines, due to the presumption set forth in W. Va. Code § 18-29-3(a) that the grievant has prevailed on the merits. Jones v. Dep't of Educ., Docket No. 99-DOE-495D (Jan. 3, 2000); Tignor v. Dep't of Educ., Docket No. 99-DOE-468D (Dec. 30, 1999);Ehle v. Bd. of Directors, Docket No. 97-BOD-483 (May 14, 1998).

3. Absent an agreement by the parties to extend the statutory time lines, a level one decision must be issued within ten working days from the date the level one grievance was filed. W. Va. Code §§ 18-29-4(a).

4. Respondent defaulted when it failed to issue a level one decision within ten working days following the filing of the grievance.

5. Respondent has not demonstrated that the delay in issuing a level one decision was directly due to sickness or illness of the immediate supervisor.

6. In order to benefit from the "relief by default" provisions contained in W. Va. Code § 18-29-3(a), 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. Hanlon v. Logan County Bd. of Educ., 201 W. Va.305, 496 S.E.2d 447 (1997).

7. Grievant was aware that a decision was to be issued within ten days, and failed to timely assert that a default had occurred.

8. If any doubt exists as to whether relief should be granted, such doubt should be resolved in favor of setting aside the default judgment in order that the case may be heard on the merits.

McDaniel v. Romano, 155 W. Va. 875, 878, 190 S.E.2d 8, 11 (1972). Accordingly, Respondent's motion to find no default is **GRANTED**. This case isdismissed from the dockets of this Grievance Board and remanded to Level II. The parties are further instructed to set a Level II hearing on the merits of this grievance as soon as possible.

Date: December 20, 2001 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

The actual number of days depends on whether OCBE observed Columbus Day as a holiday.