JOY BUTTS,

Grievant,

v. Docket No. 01-HE-073D

HIGHER EDUCATION INTERIM GOVERNING

BOARD/SHEPHERD COLLEGE,

Respondent.

ORDER DENYING DEFAULT

Grievant, Joy Butts, filed this grievance against her employer, Shepherd College ("Shepherd"), on February 9, 2001. This grievance was denied at Level I in a timely manner on February 15, 2001. Grievant then appealed to Level II on February 19, 2001. Grievant filed a default claim to Level IV on February 23, 2001. Grievant is at Level IV alleging her employer is in default for failure to hold a Level II hearing in a timely manner. The underlying grievance deals with a January 23, 2001 written reprimand for insubordination.

By agreement of the parties, a hearing on the issue of default was held on March 30, 2001, in Grievant's attorney's office in Martinsburg, West Virginia. (See footnote 1) This action became mature for decision on that date as the parties elected not to submit proposed findings of fact and conclusions of law. (See footnote 2)

Issues and Arguments

Grievant alleges a default occurred because Shepherd failed to schedule a Level II hearing in a timely manner. Respondent argues it did send "notice" of the hearing in a timely manner, and the date set for the hearing was also the date for another Level II hearing, which the parties had trouble scheduling because of Grievant's attorney's busy calendar. This letter also informed Grievant the hearing could be scheduled earlier if the Grievant so requested. Respondent argues this date, given the prior scheduling difficulties, should be sufficient to meet the statutory requirements.

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed as an Instructor at Shepherd College.

2. On January 24, 2001, she received a written reprimand for insubordination.

3. Grievant filed a grievance at Level I on February 9, 2001.

4. Grievant received a timely Level I response on February 15, 2001.

5. On February 19, 2001, a state holiday, Grievant appealed to Level II. The grievance form noted Larry Schultz was the attorney of record, and this was Grievant's attorney from the prior grievance.

6. Respondent had until February 27, 2001, to hold a Level II hearing.

7. On February 23, 2001, Grievant filed a default claim at Level IV. 8. On February 23, 2001, President David Dunlop wrote Grievant scheduling the Level II hearing for March 29, 2001, ten minutes after the conclusion of the other Level II hearing scheduled for that day in another, prior grievance filed by Ms. Butts.

9. Grievant did not file a default claim after receiving the notice of hearing.

10. In that letter, President Dunlop noted the prior grievance had been received on October 4, 2000, and a hearing had been scheduled in a timely manner on October 10, 2000. Grievant's attorney was unable to attend on that date because of a schedule conflict, and the Respondent's attorney, Alan Perdue, had agreed to a continuance with an agreement that Grievant's attorney would provide an acceptable date by October 30, 2000.

11. In the letter referred to in Finding of Fact 8, President Dunlop noted Shepherd had yet to receive dates from Grievant's attorney, and President Dunlop was now setting the prior grievance and this grievance on March 29, 2001, unless he received a request from Grievant for a prior date.

12. Grievant received this letter on February 24, 2001.

13. Grievant did not request an earlier hearing date.

14. The Level II hearing in the prior grievance was held on March 29, 2001, but Respondent did not hold a Level II hearing on this grievance because it believed it no longer had jurisdiction due to the default request.

15. There was no claim of sickness or illness on the part of Respondent.

Discussion

This Grievance Board has previously adjudicated related issues arising under the default provision in the grievance statute covering education employees, W. Va. Code § 18-29-3(a). See, e.g., Della-Giustina v. Bd. of Trustees/W. Va. Univ., Docket No. 99- BOT-272D (Nov. 9, 1999); Ehle v. Bd. of Directors, Docket No. 97-BOD-483 (May 14, 1998); Gruen v. Bd. of Directors, Docket No. 94-BOD-256 (Nov. 30, 1994); Wadbrook v. W. Va. Bd. of Directors, Docket No. 93-BOD-214 (Aug. 31, 1993); Flowers v. W. Va. Bd. of Trustees, Docket No. 92-BOT-340 (Feb. 26, 1993). Typically, when a grievant is claiming he prevailed by default under the statute, he bears the burden of establishing such default by a preponderance of the evidence. Friend v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-346D (Nov. 25, 1998). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Hunt v. W. Va. Bureau of Employment Programs, Docket No. 97-BEP-412 (Dec. 31, 1997).

The default provision applicable to education personnel grievances 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 theremedy to be granted so as to comply with the law and to make the grievant whole.**

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 provision, the Grievance Board has jurisdiction to hear a grievant's claim seeking relief by default, based upon the employer's alleged procedural violation, i.e., failure to respond to the grievance within the time limits contained in W. Va. Code § 18-29-4. If a default has occurred, then the grievant wins, and Respondent may request a ruling at level four regarding whether the relief requested should be granted. If a default has not occurred, then the grievant may proceed to

the next level of the grievance procedure.

W. Va. Code § 18-29-4(a & b) provides the following directions regarding when a respondent and a grievant must act at Levels I and II:

(a) 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 the grievant 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.

(b) Level two.

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 [§ 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. Such decision may affirm, modify or reverse the decision appealed from.

This case presents a quandary between the requirements of the Code Section and the logical conclusions reached by Respondent in scheduling this grievance. It is noted both parties were represented by attorneys.

It is clear Respondent did not hold a hearing within five days of the filing to Level II, nor did Respondent call Grievant's attorney to schedule this hearing. (See footnote 3) However, it is understandable why Respondent took the action it did, as it had little prior success in obtaining dates from Grievant's attorney. Additionally, Respondent believed the grievances should be held in chronological order in which they had been received. Further, it would appear that Respondent believed Grievant was not concerned about the timelines from the behavior exhibited in the prior grievance.

It is important to note that when Grievant alleged default on February 23, 2001, Respondent was not in default. Grievant had filed to Level II on a holiday, Monday, February 19, 2001. (See footnote 4) The date Respondent would have received the appeal would be February 20, 2001, and that date would not be counted. Respondent was required to hold a hearing by February 27, 2001. On February 23, 2001, Respondent scheduled the hearing for March 29, 2001; a date outside the required time frames. (See footnote 5) However, Grievant was also informed this would be the date for the hearing unless Respondent received a request for an earlier hearing date. Grievant made no such request.

A feeling of pretense accompanies this behavior. When the Respondent had scheduled the prior grievance in a timely manner, there was a scheduling conflict, and when new dates were needed they were never received, causing Respondent to finally schedule the grievance without Grievant's input some six months later. It is not surprising in this set of facts Respondent did not attempt to schedule the second grievance hearing on an earlier date.

Respondent's argument that a request for a continuance in the prior grievance estops Grievant from alleging default here is not accepted. Each grievance filed is separate and entitled to be processed within the time frames. However, 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). As stated in Duruttya, supra, the grievance process is for "resolving problems at the lowest possible administrative level." 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). Further, Duruttya, supra, noted that in the absence of bad faith, substantial compliance is deemed acceptable.

The specified time limits in the grievance statute may be extended for a "reasonable time" by mutual, written agreement of the parties. See W. Va. Code § 18-29-3(g). Waiver of the strict statutory timelines is a common occurrence within the context of the grievance procedure. Parker v. W. Va. Dep't of Health and Human Resources, Docket No. 99-HHR- 296D (Nov. 30, 1999). This fact is demonstrated by Grievant's prior waiver in the previous grievance. **(See footnote 6)** **This practice benefits both parties by allowing employers sufficient time to give grievances careful attention and care, rather than "rushing" to judgment. Jackson v. Hancock County Bd. of Educ., Docket No. 99-15-081D (May 5, 1999). See Parker, supra. Given the specific facts of this case, the undersigned Administrative Law Judge believesto find default here would not promote the goals of the grievance procedure to prevent a quagmire. However, this ruling does not indicate hearings should not be quickly scheduled and within the time frames outlined by statute. Each grievance should be treated as a separate occurrence. Both parties should schedule grievances quickly, and should attempt to find dates within the time frames, if at all possible.**

The above-discussion will be supplemented by 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). Harmon v. Fayette County Bd. of Educ., 205 W. Va. 286, 516 S.E.2d 748 (1999).

2. At the time Grievant filed her default claim, Respondent was not in default.

3. Given Grievant's total lack of response to scheduling a prior grievance on Grievant's compensation, it was reasonable for Respondent to assume Grievant would wish to set the

hearing on this instant grievance at a time convenient to her attorney.

4. Given these very specific set of facts, Grievant has failed to prove this default claim.

Accordingly, Grievant's request for a determination of default under W. Va. Code § 18-29-3(a) is DENIED, and this grievance is remanded to level two for a hearing on themerits. 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.

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JANIS I. REYNOLDS

Administrative Law Judge

Dated: April 30, 2001

Footnote: 1

A pre-hearing conference was conducted on March 19, 2001, to clarify issues and set the time and place of the default hearing.

Footnote: 2

Grievant was represented by Attorney Larry Schultz, and Respondent was represented by its attorney, Alan Perdue.

Footnote: 3

Grievant's attorney believed the hearing must be held on a mutually agreeable date within five days. While this action would certainly be preferable, it is not required. It would be better for Respondent to schedule the hearing, in a timely manner, and of course allow Grievant to reschedule, as opposed to not meeting the timelines. This way Respondent has protected itself from default, and Grievant has an opportunity to request easily a continuance with the parties agreeing to a waiver of the timelines.

Footnote: 4

Neither party indicated whether this date was considered a holiday at Shepherd.

Footnote: 5

There is no information as to when the prior grievance might have been scheduled if Respondent had not taken the bull by the horns and set a date.

Footnote: 6

It is unclear whether this prior waiver was in writing, but the parties agree there was a decision to extend the

time frames for holding the prior grievance hearing.