ELLENDA WARD, et al.,

Grievants,

v. **Docket No. 03-06-211D**

CABELL COUNTY BOARD OF EDUCATION,

Respondent.

ORDER DENYING DEFAULT

Grievants filed a motion for default at Level IV on July 15, 2003, against their employer, the Cabell County Board of Education ("CCBOE" or "Board"), claiming it defaulted on their grievance at Level III. The underlying grievance alleges favoritism and discrimination with regard to uniformity of employment days. A hearing was scheduled for August 11, 2003, but the parties agreed to submit the default case for decision based on stipulations and an attached record. Accordingly, the hearing was canceled, and the default decision became mature for decision on August 8, 2003. (See footnote 1)

The material facts in this matter are not in dispute, and are set forth in the following stipulations of the parties.

Stipulations

1. The grievants instituted a grievance which was heard at Level Two and denied by the Superintendent's designee in a written decision dated June 17, 2003.

2. On June 24, 2003, the grievants filed a Level Three appeal. 3. On June 26, 2003, representatives of the grievants and the Respondent signed an agreement waiving the timelines for the Level Three appeal.

4. At its meeting on July 7, 2003, the Board considered its options for processing the grievance at Level Three.

5. By letter dated July 9, 2003, the Superintendent advised the grievants about the outcome of the Board's consideration of its options at the July 7 meeting.

In addition to these above-stated Stipulations, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. The waiver dated June 26, 2003, and signed by Grievants indicates they would waive the timelines "[u]ntil the next regular board meeting if possible," and the CCBOE agreed to place the grievance on the July 7, 2003 Board agenda to decide whether to: "1) Hear grievance[;] 2)Make decision on Record[; or] 3)Send to Level IV."

2. At the Board meeting held July 7, 2003, there were only four Board members present. The Board voted two to two on all three options listed in Finding of Fact 1. The Board then agreed to take the matter up at the next Board meeting when the full Board was present. 3. Subsequently, Board's counsel sought for an extension of the timelines to allow the Board to reconsider the issues at its next meeting scheduled for July 15, 2003.

4. Hearing no reply about the extension, and with the timelines running out, Superintendent David Roach, after consultation with counsel, wrote the July 9, 2002 letter which stated, "the Board's action of July 7 was tantamount to waiving participation in the grievance at Level Three. As you know, when a county board waives participation in a grievance at Level Three, the grievants may proceed to Level Four."

5. Grievants did not specify the reasons why they wanted to have the grievance heard at Level III pursuant to the requirements of W. Va. Code § 18-29-4(c).

Issues and Arguments

Grievants claim they have prevailed by default because "the Cabell County Board of Education failed to issue a decision in the time limits agreed; therefore, the grievants shall prevail by default." (Ms. Hubbard's Letter dated July 14, 2003, requesting a default ruling.) Respondent asserts no default occurred. (Mr. Seufer's letter dated July 15, 2003).

Discussion

The issue of default in grievances filed by education employees is within the jurisdiction of the Grievance Board. W. Va. Code § 18-29-3(a) states the following:

> (a) 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 . . . [§ 18-29-4] . . . of this article shall be considered 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 . . . . 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. Withinfive 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 a claim of default, the grievant bears the burden of establishing that he prevailed by default by a preponderance of the evidence. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002); See Friend v. W. Va. Dep't of Health and 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); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id. Specifically, with regard to proceedings at Level III under the grievance procedure for education employees, W. Va. Code § 18-29-4(c) provides the following information about filing at Level III:

> Within five days of receiving the decision of the chief administrator, the grievant may appeal the decision to the governing board of the institution or may proceed directly to level four. An appeal to the governing board shall set forth the reasons why the grievant is seeking a level three review of the decision of the chief administrator. Within five days of receiving the appeal, such governing board may conduct a hearing in accordance with section six of this article, may review the record submitted by the chief administrator and render a decision based on such record or may waive the right granted herein and shall notify the grievant of such waiver. Any decision by the governing board, including a decision to waive participation in the grievance, shall be in writing and shall set forth the reasons for such decision, including the decision to waive participation in the grievance. If a hearing is held under the provisions of this subsection, the governing board shall issue a decision affirming, modifying or reversing the decision of the chief administrator within five days of such hearing.

The time periods in the grievance procedure are not jurisdictional in nature and can be waived by the parties. W. Va. Code § 18-29-3(a). See Plumley v. W. Va. Div. of Natural Resources, Docket No. 00-DNR-091D (June 22, 2000); Skeens v. Lincoln County Bd. of Educ., Docket No. 99-22-171 (Aug. 31, 1999); Jackson v. Hancock County Bd. of Educ., Docket No. 99-15-081D (May 5, 1999).

This default request comes before the Grievance Board in an unusual way. The parties agreed to waive the timelines at Level III until the July 7, 2003 Board meeting. At this Board meeting, the Board, voting two to two on all three options, could not agree on any action to take and decided to review the matter at the next meeting. This review could not take place because Grievants did not agree to an extension, and time was running out for CCBOE's response. W. Va. Code § 18-29-4(c) states the Board has five days to respond after a hearing.

Given the specific facts of this default, the undersigned Administrative Law Judge cannot find CCBOE defaulted. Administrative notice is taken that many boards routinely waive participation at Level III, and this instance CCBOE was faced with the need to meet the statutory deadlines as Grievants did not agree to another extension. (See footnote 2) The response Grievants received was within the statutory timelines.

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

Conclusions of Law

1. In a claim of default, the grievant bears the burden of establishing that he prevailed by default by a preponderance of the evidence. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002); See Friend v. W. Va. Dep't of Health and 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); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997).

2. With regard to proceedings at level two under the grievance procedure for education employees, W. Va. Code § 18-29-4(c) provides as follows:

> Within five days of receiving the decision of the chief administrator, the grievant may appeal the decision to the governing board of the institution or may proceed directly to level four. An appeal to the governing board shall set forth the reasons why the grievant is seeking a level three review of the decision of the chief administrator. Within five days of receiving the appeal, such governing board may conduct a hearing in accordance with section six of this article, may review the record submitted by the chief administrator and render a decision based on such record or may waive the right granted herein and shall notify the grievant of such waiver. Any decision by the governing board, including a decision to waive participation in the grievance, shall be in writing and shall set forth the reasons for such decision, including the decision to waive participation in the grievance. If a hearing is held under the provisions of this subsection, the governing board shall issue a decision affirming, modifying or

reversing the decision of the chief administrator within five days of such hearing.

3. The time periods in the grievance procedure are not jurisdictional in nature and can be waived by the parties. W. Va. Code § 18-29-3(a). See Plumley v. W. Va. Div. of Natural Resources, Docket No. 00-DNR-091D (June 22, 2000); Skeens v. LincolnCounty Bd. of Educ., Docket No. 99-22-171 (Aug. 31, 1999); Jackson v. Hancock County Bd. of Educ., Docket No. 99-15-081D (May 5, 1999).

4. As Grievants received a response within the statutory timelines, no default occurred.

Accordingly, Grievants' claim for default is **DENIED**, and the parties are directed to submit five dates for a Level IV hearing, if they choose to continue with this grievance. (See footnote 3)

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: August 25, 2003

Footnote: 1

Grievants were represented by Susan Hubbard from the West Virginia Education Association, and the Board was represented by Attorney Howard Seufer of Bowles Rice McDavid Graff and Love.

Footnote: 2

It is noted that in Donnellan, supra, a default was denied because of the failure of the grievant to specify the reasons for the appeal to Level III as required by the statute.

Footnote: 3

Of course, if the parties wish to agreed to have the grievance heard at Level III then this would be by their agreement.