JOSEPH HICKS,

Grievant,

v. **Docket No. 02-30-357D**

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

ORDER DENYING DEFAULT

On November 4, 2002, the Monongalia County Board of Education requested a level four hearing regarding Grievant's allegation that a default had occurred at level two. A hearing was held in the Grievance Board's office in Westover, West Virginia, on January 28, 2003, on Grievant's claim of default. Grievant was represented by counsel, John E. Roush, and Respondent was represented by counsel, Kelly J. Kimble. This matter became mature for consideration upon receipt of the parties' fact/law proposals on February 26, 2003

The following findings of fact are made based upon a preponderance of the evidence of record.

Findings of Fact

___1. Grievant is employed by Respondent as a bus operator.

2. On June 6, 2002, Grievant filed a level one grievance seeking back pay for prior experience working as a bus driver in another state.

3. Grievant's supervisor denied the grievance at level one on June 24, 2002.

___4. Grievant returned from an extended vacation and received the level one decision on July 13, 2002. 5. Grievant went to the office of Rick Williams, Assistant Manager of Human Resources, on July 15, 2002, to file his level two appeal. Because Mr. Williams was not in, Grievant did not actually deliver the grievance form to Mr. Williams until July 19, 2002. (See footnote 1)

6. When Grievant delivered the grievance form to Mr. Williams, he also provided documentation verifying his prior years of experience in another state. Mr. Williams agreed that

Grievant should receive credit for the years of experience, and he told Grievant this.

7. Mr. Williams adjusted Grievant's salary to reflect the years of experience, effective August 1, 2001. He indicated to Grievant that he could receive back pay for one year. Grievant disputed this, contending that he should receive back pay for the entire five years of his employment.

8. When a level two hearing had not been scheduled by August 13, Grievant went to speak with Louis Hlad, Director of Human Resources, whom he had known personally for many years. (See footnote 2) Dr. Hlad advised Grievant that he was entitled to win by default, and that he should discuss the matter with Mr. Williams.

9. The following day, August 14, 2002, Grievant again spoke with Mr. Williams about the level two grievance. It is unclear what was discussed during this meeting, but Grievant did not mention to Mr. Williams that he was claiming default.

10. Grievant received the one year of back pay in his paycheck dated September 13, 2002. Upon receiving it, Grievant questioned Sandra Ott, Payroll Accountant,regarding the amount. When he was informed that the check included one year of back pay, Grievant asked Ms. Ott to void the check, and explained to Mr. Williams that he would not accept less than five years of back pay.

11. Throughout July, August, and the first half of September, Mr. Williams believed that he and Grievant were “working it out,” so he had not scheduled the level two hearing. Upon being informed that Grievant would not accept the one year's back pay, Mr. Williams contacted Grievant's representative to schedule the hearing.

12. A level two hearing was held before Dr. Hlad on October 3, 2002. Grievant still did not assert a claim of default and participated in the level two hearing with his counsel.

13. The grievance was denied in a written level two decision dated October 22, 2002. After receiving the decision, Grievant went to Dr. Hlad to inquire why he had not won by default, and Dr. Hlad informed him that the default claim had to be raised by Grievant.

14. Grievant filed a level four appeal through his attorney on October 30, 2002. In the statement of grievance, after stating the claim regarding experience credit, he stated:

> (Last week Grievant informed the undersigned that he was concerned that the Respondent had defaulted in failing to timely setup a hearing at level II. He is currently seeking the paperwork to determine if a default occurred. If we conclude that this is the case, we will notify the Respondent and the grievance board as soon as said determination is made so that appropriate proceedings can begin.)

15. On November 3, 2002, Grievant filed a written notice of default, claiming a default had occurred at level two.

Discussion

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.

W. Va. Code §18-29-4 provides, in pertinent part, regarding the processing of grievances at 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 [§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.

The burden of proof is upon the grievant who claims a default to prove by a preponderance of the evidence that a default has occurred. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002). Where Respondent asserts astatutory excuse to the default, the burden of proof is upon Respondent to prove the same by a preponderance of the evidence. 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.

There can be no dispute that Grievant's level two hearing was not scheduled or held within the five-day statutory timeframe. Accordingly, the question to be decided is whether or not Respondent's justification for not scheduling the hearing was valid. Additionally, Respondent asserts that Grievant knew about the alleged default for several months before asserting it, even participating in the level two hearing and waiting until after a decision was rendered, which should bar his default claim.

Although Grievant contends that he never agreed to accept one year of back pay, it is clear that Mr. Williams did, in fact, make every effort to resolve the grievance by compensating Grievant for the experience credit to which he was entitled. It has been previously recognized by this Grievance Board on many occasions that, when a grievance evaluator has taken steps to resolve the grievance, even if it results in a technical default, it is considered substantial compliance with the statutory time limits. Thomas v. Clay County Health Dep't, Docket No. 01-CCHD-422D (Sept. 26, 2001). As stated recently in Goff v. West Virginia Department of Transportation, Docket No. 02-DOH-245D (Sept. 10, 2002), “to find a default because the Grievance Evaluator failed to fully comply with the procedural requirements would raise form over substance in contravention of the intent ofthe grievance procedure.” That case also involved a situation where the evaluator believed the issue had been resolved and verbally informed the grievant of his decision, believing no further proceedings were necessary, which was found to be substantial compliance.

Moreover, it is quite clear in the instant case that Grievant was informed of his right to claim default as early as August of 2002, and, inexplicably, he did not do so until after the level two decision was rendered in November and the case had been appealed to level four. An employee is allowed to pursue a default claim only if he raises it as soon as he becomes aware of the default. Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997); Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995). The grievant is also required to submit the default claim before a response to the grievance has been received. Harmon v. Fayette County Bd. of Educ., 205 W. Va. 125, 516 S.E.2d 748 (1999). It has been previously held that, even if the employee chooses to go forward with the hearing in a case in which he believes default has occurred, he can preserve his right to default by asserting it at the outset of the proceedings. See Bell v.

Northern Regional Jail and Correctional Facility, Docket No. 99-CORR-054D (Apr. 14, 1999). Grievant did not do so here, although presented with many opportunities before, during and after the level two hearing. He contends that he was not sure whether a default had occurred and needed to investigate the matter. However, Grievant clearly testified that Dr. Hlad told him he was entitled to win by default on August 13, but he did not raise the subject with Mr. Williams when he spoke with him the following day. Grievant has failed to explain this, nor has he provided an explanation for why he did not raise the default issue at the level two hearing. For the foregoing reasons, Grievant is not entitled to prevail by default, and this grievance will proceed to a level four hearing on the merits. The following conclusions of law support the decision reached.

Conclusions of Law

1. The burden of proof is upon the grievant who claims a default to prove by a preponderance of the evidence that a default has occurred. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002). Where Respondent asserts a statutory excuse to the default, the burden of proof is upon Respondent to prove the same by a preponderance of the evidence.

2. The grievant prevails by default if a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required, unless prevented from doing so directly as a result of sickness or illness. W. Va. Code § 18-29-3(a).

3. At level two, W. Va. Code §18-29-4 requires that a hearing be conducted within five days of receipt of the appeal.

4. A good faith effort to resolve the grievance, although it results in a technical default, may be considered substantial compliance with the statutory deadlines. Thomas v. Clay County Health Dep't, Docket No. 01-CCHD-422D (Sept. 26, 2001).

5. An employee is allowed to pursue a default claim only if he raises it as soon as he becomes aware of the default. Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997); Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995). 6. Due to Respondent's good faith effort to resolve the grievance at the lowest possible level, along with Grievant's failure to raise the default issue as soon as he became aware of it, Grievant is not entitled to prevail by default.

Accordingly, Grievant's request for a judgment of default is **DENIED.** The parties are hereby

ORDERED to confer with another and provide this office with at least three mutually agreeable dates for a level four hearing by **March 24, 2003**.

Date: March 14, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Grievant testified that there were other people working in the office, but he did not feel comfortable leaving the grievance form with anyone other than Mr. Williams.

Footnote: 2

Although Dr. Hlad serves as level two hearing evaluator for Respondent, it does not appear that Grievant knew this, nor did he consult his advice in that capacity.