JOE TOOTHMAN,

Grievant,

v. **Docket No. 05-24-036D**

MARION COUNTY BOARD OF EDUCATION,

Respondent.

ORDER DENYING DEFAULT

___Joe Toothman ("Grievant") filed a Notice of Default Motion with this Grievance Board on February 4, 2005, alleging a default occurred at level two of the grievance process. Accordingly, a hearing was held in Westover, West Virginia, on April 8, 2005, for the purpose of determining whether or not a default had occurred. Grievant was represented by coworker Tom Bowman, and Respondent was represented by counsel, Stephen R. Brooks.

The following facts have been proven by a preponderance of the evidence submitted at the level four default hearing.

Findings of Fact

1. On an unspecified date, Grievant filed a level one grievance with his employer. In late 2004, a request was made that the Grievance Board provide mediation services in an attempt to assist the parties in resolving that grievance.

2. A mediation session was conducted by Administrative Law Judge Sue Keller on January 4, 2005. At the conclusion of the session, the parties expressed a desire to take some additional time in order to determine if a settlement was possible. Therefore, they were to notify ALJ Keller at a later date as to whether or not the grievance had settled. 3. On January 27, 2005, the parties telephoned ALJ Keller to inform her that their settlement efforts had been unsuccessful. During that conversation, ALJ Keller asked the parties how they wished to proceed, and Grievant's representative, Mr. Bowman, stated that he wished to return to level two for a hearing. In response,

ALJ Keller stated that Respondent should schedule a level two hearing "within five days." (See footnote 1) Administrative Assistant Gary Price participated in this phone conversation on behalf of Respondent.

4. ALJ Keller issued a Dismissal Order in the mediation case (Docket No. 04-24- 027M) on January 31, 2005. This Order stated as follows regarding level two proceedings: "The Grievant should now proceed at Level II."

5. Upon receipt of the Dismissal Order, on February 2, 2005, Mr. Price notified Grievant that his level two hearing had been scheduled for February 8, 2005.

6. Grievant's representative received the memorandum from Mr. Price on Feburary 2 regarding the scheduling of the level two hearing, and he notified Mr. Price that day that he believed ALJ Keller meant for the level two hearing to be *held* within five working days of the January 27 phone conference. Therefore, he informed Mr. Price that if the hearing were not held by February 3, the fifth working day following January 31, a default would occur.

7. Although Mr. Price had understood ALJ Keller's instructions as directing him to *schedule* (rather than *hold*) the level two hearing within five days, he rescheduled the level two hearing after being informed by Mr. Bowman that a default claim would be raised. On the morning of February 3, 2005, Grievant and Mr. Bowman were telephoned and informed that the level two hearing would be held that day.

8. Mr. Bowman informed Mr. Price that he was not available for a level two hearing on February 3, and Grievant would not attend a hearing without his representative. Nevertheless, Mr. Price and Tom Deadrick, Hearing Examiner, convened a level two hearing on February 3, 2005, at 1:00 p.m. Because Grievant did not appear, the hearing was adjourned without evidence being taken.

9. On February 4, 2005, Grievant filed a Motion for Default with Respondent and this Grievance Board, claiming a level two hearing had not been held within five days of the January 31 phone conference.

Discussion

"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). Because 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).

The instant case presents an unusual circumstance, in that Grievant is alleging a default occurred due to Respondent's failure to respond to a time limit set by this Grievance Board, rather than a violation of the timeframes set forth in the grievance statute. However, as set forth above, the parties had different understandings of ALJ Keller's instruction to “set a hearing within 5 days.” Nevertheless, as Respondentcontends, when informed of Grievant's differing perception of the time frame for holding the level two hearing, Mr. Price immediately made every effort to hold the hearing in accordance with Grievant's expectations and to comply with the directed time constraints. As recently discussed in Patrick v. Dep't of Transp., Docket No. 04-DOH-378D (Feb. 7, 2005), it is within this Grievance Board's authority to “define the triggering event for the running of the lower level procedural timelines,” in accordance with its statutory jurisdiction over procedural issues at levels two and three. See W. Va. Code § 29-6A-5(a). However, in the instant case, the parties had differing views regarding the ALJ's “definition” of the “triggering event.”

The 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. Morrison v. Div. of Labor, Docket No. 99-LABOR-146D (June 18, 1999). See also Deel v. Bureau of Employment Programs, Docket No. 00-BEP-256D (Nov. 17, 2000).

In addition, 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).

The undersigned finds that, under the circumstances presented, Grievant is not entitled to relief by default. Mr. Price had a reasonable, but different, interpretation of the time constraints and expectations placed upon Respondent when this grievance was remanded to level two. Moreover, Respondent promptly rescheduled the level two hearing upon being informed of Grievant's belief that it needed to be held by February 3, 2005, to comply with the ALJ's instructions. Regardless of Grievant's representative's unavailability for that hearing, Respondent made a good faith effort to “substantially comply” with the time limit set by this Grievance Board. Grievant's attempt to claim default after the hearing was rescheduled, within the five-day timeframe, and after refusing to participate in that hearing (due to alleged unavailability) creates just the type of “procedural quagmire” that the grievance procedure is not meant to be and violates the requirements of Harmon, supra.

Accordingly, this matter will be remanded to level two for a hearing, since Grievant and his representative were unavailable for the previously scheduled hearing.

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

2. A grievant claiming he has prevailed by default 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).

3. When a grievance is remanded back to a lower level, it is within this Grievance Board's authority to “define the triggering event for the running of the lower level procedural timelines,” in accordance with its statutory jurisdiction over procedural issues at levels two and three, pursuant to W. Va. Code § 29-6A-5(a). Patrick v. Dep't of Transp., Docket No. 04-DOH-378D (Feb. 7, 2005).

4. "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). In the absence of bad faith, substantial compliance is deemed acceptable. Duruttya, supra; Morrison v. Div. of Labor, Docket No. 99-LABOR-146D (June 18, 1999). See also Deel v. Bureau of Employment Programs, Docket No. 00-BEP-256D (Nov. 17, 2000).

5. Because the parties had differing interpretations of the Grievance Board's instructions regarding the timeframe for level two proceedings, and because Respondent substantially complied with those directives by rescheduling the level two hearing, Grievant is unable to meet his burden of proving that a default occurred in this case.

Accordingly, Grievant's request for relief by default is **DENIED**. This matter is hereby **REMANDED** to level two for a hearing on the merits of the grievance, and the hearing shall be held within **10 WORKING DAYS** of the date of this Order, unless otherwise agreed in writing by the parties.

Date: April 15, 2005

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

This finding is based only upon the recollections of the participants in the conversation, and the exact wording of the ALJ's directive is unknown.