CRAIG ADKINS,

Grievant,

v. **Docket No. 05-22-331D**

LINCOLN COUNTY BOARD OF EDUCATION,

Respondent.

ORDER GRANTING DEFAULT

Grievant, Craig Adkins, filed a motion for default at Level IV on September 28, 2005, against his employer, the Lincoln County Board of Education ("LCBOE" or "Board"), claiming LCBOE defaulted on his grievance at Level II. The underlying grievance deals with a compensation issue.

A default hearing was held on November 3, 2005, and this case became mature for decision on that date as the parties elected not to submit proposed Findings of Fact and Conclusions of Law. (See footnote 1)

Issues and Arguments

Grievant claims he has prevailed by default because LCBOE failed to issue a Level II Decision within the required time frame. LCBOE notes it was under the State Department of Education ("SDOE") at the time, and SDOE was undergoing great changes during this time that caused it to lose track of this Level II Decision.

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

Findings of Fact

1. Grievant filed this grievance on May 31, 2005. 2. LCBOE notified SDOE, and SDOE appointed Ben Shue to hold the Level II hearing. By agreement, the Level II hearing was held on August 1, 2005.

3. The parties agreed the Level II Decision would be issued on August 18, 2005.

4. Grievant filed for default on September 28, 2005, when he did not receive the Decision.

5. After William Grizzell, LCBOE Superintendent, received notice of the default, he called SDOE and found out the Decision had been written, but had never been approved or mailed.

6. After Grievant filed for default, the Level II Decision was issued.

7. No testimony identified any sickness or illness by Mr. Shue, or any other party involved in issuing the Level II Decision

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. 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.

(Emphasis added).

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 Res., 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 obligation. Id.

W. Va. Code § 18-29-4(b) provides the following directions regarding when Respondent must act at Level II:

> 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.

The parties agreed the decision would be issued on August 18, 2005, and it was not. While the undersigned Administrative Law Judge takes notice that there was much activity and change at the SDOE at the time this decision was to be issued, W. Va. Code § 18-29-3(a) does not make allowances for these types of situations. This Code Section states, "[i]f 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." Accordingly, Grievant has met his burden of proof and established a default occurred. Respondent did not establish any statutory excuse for failure to meet the required 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 Res., 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. W. Va. Code § 18-29-3(a) states, in pertinent part:

> (a) 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.

3. W. Va. Code § 18-29-4(b) provides the following directions regarding when Respondent must act at Level II:

> 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.

4. The parties agreed the Decision would be issued on August 18, 2005, and it was not.

Accordingly, Grievant established LCBOE failed to issue the Level II Decision within the agreed upon time frame.

Grievant's request for a finding of default is **GRANTED**. At the Level IV Default hearing, the parties agreed a remedy hearing would be requested if default was found. Consequently, the parties are directed to submit five, mutually agreed upon dates for a default remedy hearing.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: November 17, 2005

Footnote: 1

Grievant was represented by Gary Archer, from the West Virginia Education Association, and LCBOE was represented by James Gabehart, Esq.