DOUGLAS TENNANT,

Grievant,

v. **Docket No. 06-24-135D**

MARION COUNTY BOARD OF EDUCATION,

Respondent.

ORDER DENYING DEFAULT

On April 25, 2006, Grievant appealed his grievance to level four and claimed a default had occurred at level two. A hearing on the default issue was conducted in the Grievance Board's office in Westover, West Virginia, on June 30, 2006. Grievant was represented by John E. Roush, Esquire, of the School Service Personnel Association ("SSPA"), and Respondent was represented by counsel, Stephen R. Brooks. This matter became mature for consideration upon receipt of the parties' fact/law proposals on July 17, 2006.

The following material facts have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant initiated a grievance on March 2, 2006, alleging he should have been hired for a Truck Driver/Groundsman/General Maintenance position. The position had been given to an applicant with more seniority, but who needed to obtain the necessary certifications for all of the position's classifications.

2. A level two hearing was conducted on March 17, 2006. At the conclusion of the hearing, the parties agreed that a decision would be issued by March 31, 2006. 3. Grievant was represented at the level two hearing by Mike Foley, a county SSPA representative.

4. During the hearing, the parties also discussed Respondent's desire to allow the successful applicant to complete the necessary testing, which was anticipated to occur by March 31, 2006. If he did not obtain the needed licenses, then he would not be placed in the position.

5. The successful applicant was unable to take the necessary tests before March 31, 2006.

6. A level two decision was not issued by March 31, 2006.

7. After not receiving a level two decision, Grievant asked Mr. Foley to “find out what happened.”

8. Mr. Foley met with Gary Price, Administrative Assistant, on April 6, 2006, regarding several matters. At the end of the discussion, Mr. Foley asked why Grievant's decision had not been issued, and Mr. Price stated that the successful applicant had not been able to take the tests yet. Mr. Price proposed that they wait until May 1, 2006, so that the tests could be completed.

9. Mr. Foley contacted Grievant the following day, on April 7, 2006, regarding an extension for the level two decision as proposed by Mr. Price. Grievant advised Mr. Foley that he did not want to wait any longer.

10. On the same day, April 7, 2006, Grievant filed a notice of default with Mr. Price. 11. On April 12, 2006, Mr. Price issued a written response to Grievant's default claim, stating that it was his understanding that Grievant's representative had agreed to allow an extension until the tests had been attempted.

12. On April 13, 2006, Grievant filed an appeal to level three. After receiving no response, he appealed to level four on April 25, 2006.

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).

Grievant argues that, because he did not agree to a further extension after his representative's meeting with Mr. Price, he was within his rights to claim default. Also, Mr. Foley testified that he told Mr. Price that he would have to discuss the matter of an extension with Grievant before agreeing to it, so no extension was approved. Respondent, however, contends that an obvious misunderstanding occurred when Mr. Price and Mr. Foley had their discussion, leading Mr. Price to believe that an

extension had been agreed upon until May 1. Because this misunderstanding occurred, Respondent failed to issue the level two decision.

"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). Although it is not clear whose fault, if any, it was that Mr. Foley and Mr. Price had different understandings of the discussion which took place on April 6, it is clear that Grievant decided to decline the request for an extension by filing for default the following day. If Mr. Foley's version of events is to be believed, then it would seem logical that, at a minimum, Grievant would have notified Mr. Price that the offer had been declined, prior to filing a default claim, which he easily could have pursued without requesting that Mr. Foley meet with Mr. Price to discuss the matter.

Moreover, 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). Grievant obviously knew that the level two decision was late when he sent his representative to inquire about it, yet he chose not to assert a default claim until after Mr. Price proposed an additional extension at the April 6 meeting. In addition, W. Va. Code § 18-29-3(a) provides a grievant with more than one option to pursue when a decision at any level is late. It provides that, when this happens, “the grievant *may* appeal to the next level.” Grievant's assertion of default, coupled with his appeal to level three, and then level four, has understandably contributed to Respondent's confusion regarding his claim. Under the circumstances presented, Grievant is not entitled to prevail by default.

The following conclusions of law support this discussion.

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).

2. The grievant bears the burden of establishing a 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. 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).

4. Grievant is not entitled to prevail by default under the circumstances presented.

Accordingly, Grievant's claim of default is **DENIED**. The parties are directed to confer with one another, and provide this Grievance Board with at least four mutually agreeable dates for a level four hearing on the merits **on or before August 28, 2006**.

Date: August 15, 2006

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DENISE M. SPATAFORE

Administrative Law Judge