THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

MARY WATERS,

Grievant,

Docket No. 07-47-006D

Denise M. Spatafore

Administrative Law Judge

TUCKER COUNTY BOARD OF EDUCATION,

Respondent,

and

LINDA MOSER, Intervenor.

ORDER DENYING DEFAULT

Mary Waters ("Grievant") filed a default notice with this Grievance Board on January 9, 2007, alleging a default occurred at level one of the grievance procedure. Linda Moser, the successful applicant for the position at issue, was joined as an intervenor after the default filing. A hearing was conducted in Elkins, West Virginia, on April 16, 2007, regarding whether a default had occurred. Grievant was represented by Kathryn R. Bayless, Esquire; the Board of Education was represented by counsel, Harry M. Rubenstein; and Intervenor represented herself. The default issue became mature for consideration upon receipt of the parties' fact/law proposals on April 26, 2007.

Synopsis

Grievant contends that Respondent is in default, because, in response to the grievance she filed

at level one, Superintendent Richard Hicks issued a letter stating that Grievant was “not able” to use the grievance procedure, due to her substitute status. While the superintendent's response was clearly legally incorrect in its content, it did constitutea “decision,” as required at level one, and it was issued in a timely fashion. Therefore, no default occurred.

Findings of Fact

1. Grievant is employed by Respondent as a substitute classroom teacher.

2. On November 8, 2006, Respondent posted a vacancy for an art teacher at Tucker County High School. Grievant had been serving in the position as a substitute until it could be permanently filled.

3. Grievant applied for the position and was interviewed, along with other applicants.

4. Intervenor Linda Moses was selected to fill the position, and her hiring was effective on November 20, 2006;

5. On December 4, 2006, Grievant met with Superintendent Richard Hicks to ask him about the hiring process and why she was not selected. Superintendent Hicks expressed his belief that the hiring process was performed correctly and the proper candidate selected.

6. On December 19, 2006, Grievant filed a written grievance, challenging her non-selection for the art teacher position.

7. Superintendent Hicks issued a letter to Grievant, dated December 19, 2006, stating, in part:

> After researching West Virginia State Code as well as receiving counsel from the Board's attorney, I must inform you that you do not have the ability to file [a grievance]. Under the [Code], you do not technically qualify as an employee as it relates to this matter. . . .
>
> Since the issue you wish to grieve is not related to your substitute status, you do not have the ability to use the Grievance Procedure toaddress your concerns. Therefore, I am unable to proceed with your request.

Superintendent Hicks returned the original grievance form with his response.

8. After consulting with an attorney, Grievant filed a default claim with the Grievance Board on January 9, 2007, alleging that Superintendent Hicks' letter constituted a failure to make the required

response at level one.

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 she prevailed by default under the statute, she 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 “required response” for a level one supervisor is to "state” a decision on the grievance “within ten days after the grievance is filed.” *W. Va. Code* §18-29-4(a)(3). *See Martin v. Randolph Bd. of Educ.*, 195 W.Va. 297, 465 S.E.2d 399 (1995); *Gillum v. Dep't of Transp./Div. of Highways*, Docket No. 98-DOH-387D (Dec. 2, 1998). The question presented in *Adams v. Dep't of Transp.*, Docket No. 00-DOH-383D (Mar. 13, 2001), was whether the failure to include appeal information resulted in the decision not being "a decision," and whether Respondent substantially complied with the statutory requirements. The judge in *Adams* found that, as had been similarly held in *Morrison v. Div. of Labor*, Docket No. 99-LABOR-146D (June 18, 1999), failure to include the appeal paragraph withthe decision does not automatically result in a finding of default, especially when Grievant is well aware of his or her appeal rights.

This 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. 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).

Based upon the facts presented and the testimony of Superintendent Hicks, the undersigned finds that the superintendent issued a timely response to the grievance in good faith. Although his belief regarding Grievant's “ability” to use the grievance process was obviously incorrect, he believed at that time that he was correct. He issued this “decision” in a timely fashion, on the same day that the grievance was filed. Moreover, it is obvious that Grievant did and does know that she is eligible to utilize the grievanceprocess, as evidenced by her filing of this default claim. Although Superintendent Hicks' decision was not ideal in its form, it was a timely response, which Grievant could have appealed to the next level. Respondent substantially complied with the level one statutory requirements in good faith, and, under the circumstances presented, allowing the Grievant to succeed by default would be inappropriate.

The following conclusions of law are appropriate in this matter.

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. Because Grievant is claiming she prevailed by default under the statute, she 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. At level one, the immediate supervisor is required to "state” a decision on the grievance “within ten days after the grievance is filed.” *W. Va. Code* §18-29-4(a)(3).

4. The response to the grievance at level one was issued in a timely fashion and substantially complied with the requirements of the grievance statute.

Accordingly, Grievant's claim of default is **DENIED** As previously agreed by the parties, this matter will proceed to a hearing on the merits of the case on **MAY 16, 2007**.

Date: May 3, 2007

_____

DENISE M. SPATAFORE

Administrative Law Judge