THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

JUDITH CHANG,

Grievant,

v. **Docket No. 2008-0174-BerED**

BERKELEY COUNTY BOARD OF EDUCATION,

Respondent.

ORDER DENYING DEFAULT

AND DISMISSING GRIEVANCE

Judith Chang ("Grievant") filed a level one grievance with her employer, the Berkeley County Board of Education ("the BOE"), on July 27, 2007. In response to the BOE's counsel's assertion that, because Grievant was no longer employed, there would be no level one hearing, Grievant alleged default in a letter dated August 17, 2007. On September 6, 2007, Respondent filed with this Grievance Board an objection to the default and a request for a hearing. A default hearing was convened in Westover, West Virginia, on January 16, 2008, at which Grievant was represented by counsel, Garry G. Geffert, and Respondent was represented by counsel, Gregory W. Bailey. This matter became mature for consideration upon receipt of the parties' final fact/law proposals on February 28, 2008.

Synopsis

Grievant was notified in May of 2007 that she was not recommended for rehire for the upcoming school year. She did not request a hearing or the reasons for this decision, nor did she file a

grievance at that time. Grievant's one-year, probationary contract expired on July 1, 2007, so her employment status lapsed at that time. Therefore, when she filed this grievance on July 27, 2007, she was no longer an employee and does not havestanding to avail herself of the grievance procedure or its default provisions. The request for default is denied and the grievance is dismissed.

Findings of Fact

1. Pursuant to a probationary contract, Grievant was employed by the BOE for the 2006-2007 school year as a Title 1 Reading teacher at Berkeley Heights Elementary School. On July 1, 2006, she signed a contract for a 200-day employment term for the 2006-2007 school year.

2. By certified letter dated May 10, 2007, Grievant was notified by Superintendent Manuel Arvon that at a BOE meeting held on May 7, 2007, a list of probationary employees recommended for rehire for the upcoming school year was presented to the Board, and she was not recommended for rehire. The letter further stated “[t]his notice is being sent to you as required by [West Virginia Code 18A-2-8a].”

3. Grievant did not request a hearing before the BOE regarding the reasons why she was not recommended for rehire.

4. Shortly after Grievant was notified that she would not be rehired, Anita Mitter of the West Virginia Education Association met with Assistant Superintendent David Deuell regarding the decision not to rehire Grievant. During the meeting, Ms. Mitter alleged that Grievant had not been evaluated properly and provided Mr. Deuell with a Grievance Board decision which purportedly supported her argument. Although Ms. Mitter recalled that Mr. Deuell stated that he would “take care of it,” leading her to believe that Grievant's employment would be restored, Mr. Deuell had no such recollection.

5. On May 18, 2007, Mr. Deuell and Administrative Assistant Justin Schooley went to Grievant's school to meet with her. They explained to Grievant why she was notrecommended for rehire, due to the elimination of her Title 1 position. The only available positions would have been regular classroom teaching positions, and Grievant agreed that she could not “handle” such a position, based upon her previous difficulties teaching in a middle school classroom during the 2005-2006 school year. Grievant was also advised of her right to a hearing, and she told Mr. Deuell and Mr. Schooley that she was undecided on this issue.

6. Grievant's principal, Amber Boeckmann, conducted a formal observation of Grievant in late

May of 2007, and a performance evaluation on June 5, 2007.

7. In early July of 2007, Ms. Mitter telephoned Mr. Deuell to inquire about Grievant's employment status. In response, Mr. Deuell issued a letter, dated July 11, 2007, explaining that Grievant's contract was not renewed, and that she had neither requested a hearing nor taken any affirmative steps to seek reinstatement. Accordingly, Mr. Deuell concluded that Grievant was no longer an employee, and the statutory time limits had expired.

8. On July 27, 2007, Grievant filed a level one grievance, alleging her employment had been terminated improperly.

9. By letter to Grievant's counsel dated August 2, 2007, BOE counsel Laura Sutton advised that Grievant had been notified that she was not being rehired and had not followed the statutory time limits for challenging that decision. Accordingly, as of July 1, 2007, Grievant was no longer a BOE employee, and no level one hearing would be conducted.

10. On August 17, 2007, Grievant's counsel informed Superintendent Arvon, by letter, of Grievant's “intent to enforce default,” due to the BOE's refusal to hold a level onehearing.

11. On September 4, 2007, Grievant filed a request for entry of default against Respondent with this Grievance Board.

Discussion

“The grievant prevails by default if a required response is not made by the employer within the time limits established in this article, unless the employer is prevented from doing so directly as a result of injury, illness or a justified delay not caused by negligence or intent to delay the grievance process.” W. Va. Code § 6C-2-3(b)(1) (2007). The burden of proof is upon the grievant asserting a default has occurred to prove the same by a preponderance of the evidence. *Donnellan v. Harrison County Bd. of Educ.*, Docket No. 02-17-003 (Sept. 20, 2002). 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).

In the instant case, Grievant contends that Respondent's denial of a level one hearing resulted in a default. Although it was recently held in *Waters v. Tucker County Board of Education*, Docket No.

07-47-006D (May 3, 2007), that a timely-issued letter merely stating that the employee was not eligible to file a grievance constituted a “response” within the meaning of the grievance statute, the applicable statutory provisions were modified somewhat by the 2007 legislature. (See footnote 1) While under the previous statute a levelone supervisor was only required to "state” a decision on the grievance “within ten days after the grievance is filed,” (See footnote 2) the current grievance procedure states that the chief administrator “shall hold the conference or hearing . . . within ten days of receiving the grievance[.]” W. Va. Code § 6C-2-4(a)(2) (2007). Therefore, while issued within the statutory time limits, Ms. Sutton's letter advising of Grievant's lack of employee status and refusal to hold a hearing was not the response required by the current statute.

Nevertheless, the more troubling issue here is Grievant's obvious lack of status as an employee of the Berkeley County Board of Education, due to the lapsing of her one- year probationary contract on July 1, 2007. Respondent has contended throughout this proceeding that Grievant had no entitlement to invoke the requirements of the grievance process, because she failed to assert her claim while still an employee. A somewhat similar situation was the subject of a Grievance Board decision in *Napper v. Jefferson County Board of Education*, Docket No. 05-19-347 (Mar. 22, 2006), a case in which the grievant's contract was not renewed for the upcoming school year and she did not file a grievance until July, after her contract had lapsed. However, the evidence in *Napper* established that Grievant had attempted to file the grievance in late June, while she was still an employee, but those efforts were thwarted by intervening factors beyond her control. While it was determined that Grievant did have standing to pursue the grievance, which had been initiated while still an employee, it was held that her claims regarding non-renewal of her contract were untimely.

As noted in *Napper*, the Grievance Board has previously held:

> persons who no longer hold employment status are generally not eligible to use the grievance procedure once the employment relationship was terminated, unless such termination is the subject of their grievance, or their grievance was initiated before their employment relationship was severed, and the subject matter of such grievance was not rendered moot by termination of their employment status. [Citations omitted.]

Jackson v. Div. of Corrections, Docket No. 97-CORR-345 (Jan. 30, 1998). Although in this case Grievant may contend that her “termination” is the subject of the grievance, and she alleges she did not know about it until the July 11 correspondence from Mr. Deuell, the undersigned concludes that she waived her right to grieve her non-renewal and allowed her employment to lapse.

The requirements of W. Va. Code § 18A-2-8a are quite clear. “Any probationary teacher who receives notice that he has not been recommended for rehiring . . . may **within ten days** . . . request a statement of the reasons for not having been rehired and may request a hearing before the board.” (Emphasis added.) As held in *Malcolm v. Monongalia County Board of Education*, Docket No. 01-30-593 (Feb. 28, 2002), the grievable event in this case was the BOE's decision not to rehire Grievant, which she was undisputedly notified of in a letter dated May 10, 2007. Accordingly, her filing of a grievance nearly three months later was certainly, if nothing else, untimely.

A board of education is not required to take any affirmative action, other than the after-the-fact notice required by the statute, to effectuate a “non-rehiring,” because a probationary employee's contract is for one year and automatically expires if not renewed by board action. *Miller v. Board of Educ.*, 190 W. Va. 153, 437 S.E.2d 591 (1993). Similarly, the decision in *Malcolm* noted that, with the lapse of his contract, the grievant was no longer an employee and had no standing to pursue a grievance regarding the non- renewal of that contract. As stated in *Mills v. Wayne County Board of Education*, Docket No. 06-50-415 (Mar. 5, 2007):

> Grievants' employment was terminated at the end of the 2005-2006 school year. The Grievance Board has held 'W. Va. Code § 18-29-1 provides that the purpose of the statutory grievance procedure is to allow education employees and their employer to reach solutions to problems which arise within the scope of their respective employment relationships.' Farley v. Morgan County Bd. Of Educ., Docket No. 01-32-615D, (April 30, 2002). By mutually agreed upon contractual terms, Grievants' employment relationship ended at the conclusion of the 2005-2006 school year. Therefore, in August 2006,Grievants no longer had standing to file a grievance under this statutory procedure. *See* [*Malcolm, supra.*]

Accordingly, the undersigned concludes that Grievant failed to timely challenge her non-rehiring, pursuant to the requirements of W. Va. Code § 18A-2-8a. Due to the lapsing of her employment status, effective July 1, 2007, she was not an eligible employee pursuant to the provisions of W. Va. Code § 6C-2-2 and does not have standing to pursue this grievance.

Conclusions of Law

1. “The grievant prevails by default if a required response is not made by the employer within the time limits established in this article, unless the employer is prevented from doing so directly as a result of injury, illness or a justified delay not caused by negligence or intent to delay the grievance process.” W. Va. Code § 6C-2-3(b)(1) (2007). 2. The burden of proof is upon the grievant

asserting a default has occurred to prove the same by a preponderance of the evidence. *Donnellan v. Harrison County Bd. of Educ.*, Docket No. 02-17-003 (Sept. 20, 2002). 3. A probationary teacher who is notified that he or she has not been recommended for rehiring may, within ten days of receiving the notice of the same, request a statement of the reasons for not being rehired and may request a hearing before the board of education. W. Va. Code § 18A-2-8a.

4. Pursuant to the provisions of W. Va. Code § 18A-2-8a, a board of education is not required to take any affirmative action to effectuate a "non-rehiring," because a probationary employee's contract is for one year and automatically expires if not renewed by board action. *Miller v. Board of Educ.*, 190 W. Va. 153, 437 S.E.2d 591 (1993).

5. Grievant knew she was not recommended for rehiring on May 14, 2007, and did not request a hearing or the reasons for the decision, or file a grievance regarding her non-rehiring within the statutory time limits.

6. Grievant's one-year probationary contract expired on July 1, 2007, so she was no longer an employee when she initiated this grievance on July 27, 2007; thus, she lacks standing to pursue this grievance. *See Mills v. Wayne County Board of Education*, Docket No. 06-50-415 (Mar. 5, 2007).

Accordingly, grievant's request for relief by default is **DENIED**, and this matter is **DISMISSED** from the docket of this Grievance Board.

This Order is final upon the parties and is enforceable in the Circuit Court of Kanawha County. Any party may appeal this Order to the Circuit Court of Kanawha County within thirty days of receipt of the Order. This Order is not automatically stayed pending the outcome of the appeal. W. Va. Code § 6C-2-5(c). Neither the West Virginia Public Employees Grievance Board nor any of its administrative law judges is a party to suchappeal and should not be so named.

Date: April 28, 2008

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DENISE M. SPATAFORE

Acting Chief Administrative Law Judge

Footnote: 1

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees GrievanceBoard. W. Va. Code §§ 18-29-1 to 18-29-11 and W. Va. Code §§ 29-6A-1 to 29-6A-12 were repealed and replaced by W. Va. Code §§ 6C-2-1 to 6C-2-7 and W. Va. Code §§ 6C- 3-1 to

6C-3-6 (2007).

Footnote: 2

See the repealed provisions of W. Va. Code §18-29-4(a)(3).