THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

DAVID WILLS,

Grievant,

v. Docket No. 2008-0768-DOA

DEPARTMENT OF ADMINISTRATION/

OFFICE OF TECHNOLOGY,

Respondent.

ORDER DENYING MOTION FOR JUDGMENT BY DEFAULT

On January 10, 2008, Grievant David Wills alleged a default at Level One of the grievance process. On January 15, 2008, Respondent objected to the default claim and requested a hearing on it. Grievant's January 10 letter alleged that the Director of the Office of Technology ("OT" or "Respondent") had failed to follow through, by the date specified, on relief awarded by Secretary of the Department of Administration Robert W. Ferguson, Jr., in a Level One decision dated January 2, 2008. That Level One relief was an order addressed to the OT director requiring the posting of any additional job duties Grievant had acquired after transferring from the Department of Health and Human Resources ("HHR") to OT. (Grievant had sought reallocation (or "correct allocation") and a concomitant pay increase.)

During an unrecorded telephone conference conducted by then Acting Chief Administrative Law Judge ("ALJ") Reynolds on January 22, 2008, it emerged that the Secretary's Level One decision had not advised the Grievant of his appeal rights. (See footnote 1) **Also on January 22, 2008 (no doubt following the telephone conference), Secretary**

Ferguson issued a letter advising the Grievant that, in view of the defect in the original Level One decision, hisappeal time would be extended until ten days following his receipt of the January 22 letter. The January 22 letter also contained the required language advising the Grievant of his right to appeal. During the January 22 teleconference, the parties agreed to forego a hearing on the default issue, and instead to submit written proposals by February 5, 2008. They did so, and the case became mature for decision on the default issue on that date.

Based on the Grievant's written submission on the default issue, it appears that the default he now claims is the failure of the Level One decision to advise him of his appeal rights, which the Grievant characterizes as a failure to issue a "valid" Level One decision (a failure which he maintains was not cured by the Secretary's January 22 corrective letter.) This case was reassigned to the undersigned on April 8, 2008, following Acting Chief ALJ Reynolds's retirement.

Summary

Grievant filed a motion for judgment by default at Level One of the grievance procedure based on the failure of the Level One decision to advise him of his right to appeal it. The record contains no evidence that the Respondent omitted the appeal advisement in bad faith and suggests that the Grievant was not materially disadvantaged by the Respondent's error. Under these circumstances, the intent of the law that grievances be "[r]esolv[ed] . . . in a fair, efficient, cost-effective and consistent manner," W. Va. Code § 6C-2-1(b) (2007), requires denial of Grievant's default motion, and return of the grievance to the normal grievance process, where its merits can be considered and decided.

DENIED.

After thorough review of the record, the undersigned finds the following facts:

Findings of Fact

1 1. In February 2007 Grievant was transferred from HHR to OT, where he was placed in the Information Services Division.

2 2. Apparently in September 2007, OT submitted to the Division of Personnel ("DOP") a position description form prepared by the Grievant.

3 3. DOP responded that the additional duties which the Grievant had acquired by virtue of this transfer would have to be posted in accordance with its legislative rule.

4 4. The Grievant filed a Level One grievance on November 16, 2007, requesting "correct allocation" of his position based on the submitted OT position description form within one (1) week of "accepted resolution" of the grievance, along with a corresponding pay increase.

5 5. Secretary Ferguson's January 2, 2008, Level One decision denied the requested relief, determining that W. Va. Code R., 143 CSR 1, § 9.5(a) (2007) required instead that Grievant's additional duties be posted, and he directed the OT director to post them within five business days.

6 6. The Level One decision did not advise the Grievant of his right to appeal it to Level Two of the grievance process.

7 7. On January 10, 2008, the Grievant notified Secretary Ferguson, and filed with this Board, a notice of default, alleging that OT had failed to post the Grievant's additional duties within the time period ordered by the Secretary. See Finding of Fact 5, above.

8 8. By letter received by this Board on January 15, 2008, Secretary Ferguson's General Counsel, James A. Kirby III, objected to the default claim and requested a hearing on it. 9 9. In the process of preparing for a default hearing before former Acting Chief ALJ Reynolds, to whom the case was then assigned, specifically, during an unrecorded teleconference among the parties and Judge Reynolds on January 22, 2008, it came to the attention of the Respondent and Judge Reynolds that the Level One decision had failed to advise the Grievant of his right to appeal.

10 10. In his written submission to this Board on the default issue, the Grievant objected to having been "compelled," during the January 22, 2008, teleconference, to disclose what he described as the "fatal flaw" in the January 2 Level One decision, that is, the absence of language advising him of his appeal rights (the "appeal paragraph").

11 11. Also on January 22, 2008, Secretary Ferguson issued a letter advising the Grievant that, in view of the defect in the original Level One decision, his appeal time would be extended until ten days following his receipt of the January 22 letter. The January 22 letter also contained an appeal paragraph.

12 12. The Grievant did not appeal the Level One decision. In his submission to this Board on the default question, the Grievant stated that he "does not consent to, and will not participate in, any mediation proceeding related to Grievance Docket No. 2008-0768-DOA until the matter of the default is finally and completely resolved."

13 13. At the time of the January 22, 2008, teleconference, the remedy ordered in the Level One decision was apparently in the process of being completed. The record does not reflect the ultimate outcome of the remedy.

Discussion

A grievant who alleges a default at a lower level of the grievance process has the burden of proving it 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 evidence of greater weight, or evidence which is more convincing than that offered in opposition to it. *Hunt v. W. Va. Bureau of Empl. Programs*, Docket No. 97-BEP-412 (Dec. 31, 1997); *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

W. Va. Code § 6C-2-3(b)(1) (2007) provides:

> **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.**

On its face, subsection (b)(1) applies to deadlines contained in the statute, which would not include the time the OT director was given to post the Grievant's additional duties. That was the Grievant's original default claim, as described above in the findings of fact. The Grievant apparently no longer bases his default claim on the failure to post, however. In their final submissions to this Board on the default issue, both parties argued the failure of the Level One decision to advise the Grievant of his appeal rights. This decision will therefore adjudicate whether, on the facts of this case, the absence of appeal language from the Level One decision constitutes a default, on the theory that the Level One decision was invalid, and that the Respondent therefore failed to issue the Level One decision within the time prescribed by the statute.

W. Va. Code § 6C-2-4(a)(2) (2007) requires a chief administrator (in this case, Secretary Ferguson) to "issue a written decision within fifteen days of the conference or hearing." In *Adams v. Department of Transportation*, Docket No. 00-DOH-383D (Mar. 13, 2001) and *Morrison v. Division of Labor*, Docket No. 99-LABOR-146D (June 18, 1999), thisBoard's predecessor, construing a prior version of the grievance statutes, (See footnote 2) held that "failure to include the appeal paragraph with the decision does not automatically result in a finding of default . . . ." *Waters v. Tucker County Bd. of Educ.*, Docket No. 07-47-006D (May 3, 2007).

W. Va. Code § 6C-2-1(b) (2007) provides that "[r]esolving grievances in a fair, efficient, cost-effective and consistent manner will maintain good employee morale, enhance employee job performance and better serve the citizens of the State of West Virginia." Construing a similar provision in prior versions of the grievance statutes, the Supreme Court of Appeals has said: "We do not believe that the legislature intended the grievance process to be a procedural quagmire where the merits of the cases are forgotten." *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 393 S.E.2d 739, 743 (1990). Although in *Spahr* the court's directive worked to the grievant's advantage, the *Spahr* principle is applicable to both parties.

One obvious purpose of the default statute, W. Va. Code § 6C-2-3(b) (2007), is to prevent a grievant's right to appeal from being diluted or defeated. The failure of the Grievant in this case to appeal the Level One decision after he was provided with additional time to do so suggests that his appeal rights were not so affected in fact. Rather than advancing the grievance to a resolution of its merits, the default claim in this case appears more an effort to take advantage of a good faith mistake by the Respondent. (See footnote 3) The Grievant's effort during Judge Reynolds's teleconference, described in Finding of Fact 9, to avoid revealing theabsence of the appeal paragraph from the Level One decision indicates that he was not so much prejudiced by it as interested in using it for leverage, or for victory on a technicality. While the Grievant is entitled to try to win his grievance, the process is not a game. That is the thrust of the Supreme Court's admonition in *Spahr*.

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)." *Waterstucker v. Tucker County Bd. of Educ*., Docket No. 07-47-006D (May 3, 2007). The record indicates that some twenty days passed from issuance of the Level One decision before the Grievant, reluctantly, disclosed his awareness of the missing appeal language (and his awareness of its significance).

The record contains no basis to find bad faith on Respondent's part. Secretary Ferguson's Level One decision candidly criticized Grievant's management and sympathized with the Grievant's circumstances at the time of his transfer. Although the decision did not award Grievant the remedy he had requested, that is because it concluded that DOP rules mandated a different remedy. The Secretary's decision also advised the Grievant that he bore a share of the responsibility for the situation he had grieved. The decision states:

> **[O]n balance, you too share some responsibility in this failure. In hindsight, I hope that you can see that you should have initiated your request as soon as you were confident that you were misclassified. In the hearing, you indicated that time period was significantly earlier than your original request. The fact that you waited until the transfers were announced would lead any reasonable and responsible leader to assume that your request was to enhance your compensation prior to assuming a new role in a new department. Nonetheless, you deserve fair consideration for evaluation of your skills as they relate to your current assignment.**

[Emphasis in original.] When no bad faith is shown, the failure to include advice of appealrights in a Level One decision has been held not to constitute a default, even in circumstances where the failure was not corrected. *Deel v. Bureau of Empl. Programs*, Docket No. 00-BEP-256DEF (Nov. 17, 2000).

> **It has been previously recognized by this Grievance Board on many occasions that, when a grievance evaluator has taken steps to resolve the grievance, even if it results in a technical default, it is considered substantial compliance with the statutory time limits. *Hicks v. Monongalia County Bd. of Educ.*, Docket No. 02-30-351D (Mar. 14, 2003); *Thomas v. Clay County Health Dept.*, Docket No. 01-CCHD-422D (Sept. 26, 2001). As stated . . . in *Goff v. West Virginia Department of Transportation*, Docket No. 02-DOH-245D (Sept. 10, 2002), "to find a default because the Grievance Evaluator failed to fully comply with the procedural requirements would raise form over substance in contravention of the intent of the grievance procedure."**

***Biggerstaff v. Mingo County Board of Education*, Docket No. 02-29-384D (March 24, 2003).**

This does not mean that state governmental employers may fail to advise grievants of their right to appeal with impunity. W. Va. Code § 6C-2-3(l)(2) (2007), applicable in this case, provides that "[i]f the grievant is denied the relief sought, the decision shall include the procedure for the next level of appeal for the grievant." (See footnote 4) **Each case turns on its**

facts. Failure to include appeal language in a Level One decision in some future case might result in a default. Under all of the facts and circumstances of this case, however, the Respondent's actions constitute substantial compliance with the requirements of the law.

Because the Respondent's post-decision advisement of appeal rights constitutes substantial compliance with the requirements of the statute; because the Grievant was not significantly disadvantaged by the initial failure to include written notice of his appeal rights in the Level One decision; because the Grievant failed to raise the default as soon as he becameaware of it; because there is no evidence of bad faith by Respondent; and because the Legislature intended the grievance statutes to be applied fairly, efficiently, cost-effectively, and consistently, W. Va. Code § 6C-2-1(b) (2007), the Grievant's request for judgment by default must be DENIED.

Conclusions of Law

1 1. A grievant who alleges a default at a lower level of the grievance process has the burden of proving it 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 evidence of greater weight, or evidence which is more convincing than that offered in opposition to it. *Hunt v. W. Va. Bureau of Empl. 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 2. W. Va. Code § 6C-2-4(a)(2) (2007) requires a chief administrator (in this case, Secretary Ferguson) to "issue a written decision within fifteen days of the conference or hearing." In *Adams v. Department of Transportation*, Docket No. 00-DOH-383D (Mar. 13, 2001) and *Morrison v. Division of Labor*, Docket No. 99-LABOR-146D (June 18, 1999), this Board's predecessor, construing a prior version of the grievance statutes, held that "failure to include the appeal paragraph with the decision does not automatically result in a finding of default . . . ." *Waters v. Tucker County Bd. of Educ.*, Docket No. 07-47-006D (May 3, 2007).

3 3. W. Va. Code § 6C-2-1(b) (2007) provides that "[r]esolving grievances in a fair, efficient, cost-effective and consistent manner will maintain good employee morale, enhance employee job performance and better serve the citizens of the State of West Virginia." Construing a similar provision in prior versions of the grievance statutes, the Supreme Court

of Appeals has said: "We do not believe that the legislature intended the grievance processto be a procedural quagmire where the merits of the cases are forgotten." *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 393 S.E.2d 739, 743 (1990). Although in *Spahr* the court's directive worked to the grievant's advantage, the *Spahr* principle is applicable to both parties.

4 4. "[A]n 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)." *Waterstucker v. Tucker County Bd. of Educ*., Docket No. 07-47-006D (May 3, 2007). The Grievant failed to do so in this case.

5 5. When no bad faith is shown, as in this case, the failure to include advice of appeal rights in a Level One decision has been held not to constitute a default, even in circumstances where the failure was not corrected. *Deel v. Bureau of Empl. Programs*, Docket No. 00-BEP-256DEF (Nov. 17, 2000).

> **6. It has been previously recognized by this Grievance Board on many occasions that, when a grievance evaluator has taken steps to resolve the grievance, even if it results in a technical default, it is considered substantial compliance with the statutory time limits. *Hicks v. Monongalia County Bd. of Educ.*, Docket No. 02-30-351D (Mar. 14, 2003); *Thomas v. Clay County Health Dept.*, Docket No. 01-CCHD-422D (Sept. 26, 2001). As stated . . . in *Goff v. West Virginia Department of Transportation*, Docket No. 02-DOH-245D (Sept. 10, 2002), "to find a default because the Grievance Evaluator failed to fully comply with the procedural requirements would raise form over substance in contravention of the intent of the grievance procedure."**

***Biggerstaff v. Mingo County Board of Education*, Docket No. 02-29-384D (March 24, 2003). Under all of the facts and circumstances of this case, the Respondent's actions constitute substantial compliance with the requirements of the law.**

7. The Respondent's post-decision advisement of appeal rights constitutes substantial compliance with the requirements of the statute; the Grievant was not significantlydisadvantaged by the initial failure to include written notice of his appeal rights in the Level One decision; the Grievant failed to raise the default as soon as he became aware of it, there is no evidence of bad faith by Respondent; and the Legislature intended the grievance statutes to be applied fairly, efficiently, cost-effectively, and consistently. W. Va. Code § 6C-2-1(b) (2007).

Accordingly, the Grievant's motion for judgment by default is DENIED. The Grievant has

ten days from receipt of this Decision to appeal the Level One decision to Level Two of the grievance process. Any such appeal may be filed with this Board on the form for doing so available on the Board's website, pegboard.state.wv.us, or by contacting the Board at 808 Greenbrier Street, Charleston, WV 25311, fax 304 558-1106.

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Thomas J. Gillooly

Administrative Law Judge

Date: June 6, 2008

Footnote: 1

In his written submission to this Board on the default issue, the Grievant objected to having been "compelled" to disclose what he described as the "fatal flaw" in the January 2 Level One decision, that is, the absence of language advising him of his appeal rights.

Footnote: 2

In 2007, the Legislature, 2007 Acts ch. 207, abolished the West Virginia Education and State Employees Grievance Board, replacing it with the Public Employees Grievance Board. 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: 3

At the time Secretary Ferguson rendered his Level One decision, it was still relatively early in state employers' learning curve on the new grievance statute, which significantly modified the process a grievance follows. See footnote 2.

Footnote: 4

The counterpart provision in W. Va. Code § 6C-2-3(n)(2) (2008), which takes effect June 6, 2008, is: "If the grievance is not resolved, the written decision or report shall include the address and procedure to appeal to the next level."