WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

CONNIE BROWNING,

Grievant,

v. **Docket No. 2008-0567-LogED**

LOGAN COUNTY BOARD OF EDUCATION,

Respondent.

ORDER GRANTING DEFAULT

Connie Browning ("Grievant") filed a written notice of default with the Grievance Board on February 7, 2008, alleging she was entitled to prevail by default in a grievance filed against her employer, Respondent Logan County Board of Education ("Respondent"). The underlying grievance was filed on September 26, 2007, after Grievant bid on a Licensed Practical Nurse Instructor's position at the Ralph R. Willis Career-Technical Center and was not the successful applicant. Grievant contends Respondent is in violation of grievance procedure, W. Va. Code § 6C-2-4 (2007), because a Level One decision was not rendered within fifteen days after the Level One hearing. A default hearing was scheduled and conducted regarding this issue on May 2, 2008, at the Board's Office in Charleston, West Virginia. Grievant appeared in person and with representative Susan Lattimer Adkins, Grievance Manager, WV Professional Educators Association. Respondent appeared through its counsel, Leslie Tyree, Esquire. This matter became mature for consideration on September 26, 2008, upon receipt of both parties' memorandum and/or proposed findings of fact and conclusions of law.

Synopsis

Grievant alleges she is entitled to prevail by default in a grievance filed against her employer, Respondent Logan County Board of Education. Grievant contends Respondent is in violation of W. Va. Code § 6C-2-4, in that a Level One decision was not rendered within fifteen days after the Level One hearing. Respondent acknowledges the excess in time but avers Grievant relieved the Chief Administrator of the obligation by not objecting to its request for a waiver of time. Grievant denies waiver. Respondent did not establish that Grievant or Grievant's representative waived the applicable time limit for issuing a Level One decision. Accordingly, Grievant's claim for default is Granted.

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

Findings of Fact

1 1. Connie Browning, Grievant, is currently an employee of the Logan County Board of Education and works as a Health Occupations Instructor at the Ralph R. Willis Career - Technical Center.

2 2. Grievant filed a grievance on September 26, 2007, after she bid on a Licensed Practical Nurse Instructor's position at the Ralph R. Willis Career-Technical Center and was not the successful applicant.

3 3. Grievant's representative, Susan Lattimer Adkins, Grievance Manager for the WV Professional Educators Association, identified and requested pertinent information from Respondent in order to prepare for the Level One hearing. 4 4. Respondent set a Level One hearing date for October 17, 2007, without sending the requested comparison information on the successful candidate and the Grievant to Ms. Adkins.

5 5. Grievant's representative wrote to Respondent on October 12, 2007, requesting a waiver of the statutory time lines for convening the Level One hearing pending receipt of the requested information. **(See footnote 1)**

6 6. Respondent agreed to a waiver of the statutory time line for scheduling the hearing, but failed to set an alternate date for the Level One hearing. Ultimately a Level One

hearing was held on January 10, 2008, in Superintendent Wilma Zigmond's office at the Logan County Board of Education.

7 7. February 1, 2008, is the fifteenth working day following the January 10, 2008, Level One hearing.

8 8. On February 6, 2008, Grievant's representative sent a letter via certified mail to Superintendent Zigmond seeking to enforce the default provision of the West Virginia Grievance Statute, W. Va. Code § 6C-2-3, in that the time limit for providing a Level One decision had been exceeded. Grievant requested the relief specified on the grievance statement which was filed on September 26, 2007.

9 9. On February 8, 2008, an undated decision from Superintendent Zigmond was received by the Grievant's representative, Susan Lattimer Adkins. The postmark on this decision was dated February 7, 2008. 10 10. Respondent, through its legal counsel Leslie Tyree, provided a portion of the January 10, 2008, Level One hearing transcript at the May 2, 2008, default hearing. Respondent's counsel requested and was granted leave to furnish the remainder of the transcript as soon as possible to this tribunal and to Grievant's representative, Susan Lattimer Adkins.

11 11. On August 7, 2008, Attorney Tyree communicated via e-mail with the West Virginia Public Employees Grievance Board and reported that the additional pages of the transcript of the Level One hearing did not exist.

12 12. The eighty-six page transcript that was provided of the January 10, 2008, Level One hearing stopped abruptly. It does not provide a complete rendering of the Level One hearing.

13 13. Page two of the January 10, 2008, Level One Hearing transcript, provides that Attorney Tyree states, “Okay. Ms. Zigmond will be rendering the decision and I want to waive the time limits, even though it will most likely be within the time frame, because we have a lot of grievances right now.” The record does not reflect that Grievant or Grievant's representative made a response.

14 14. Grievant and Grievant's representative had met prior to the Level One hearing on January 10, 2008, and consciously decided that in light of their respective belief that Respondent had procrastinated in scheduling the Level One hearing (when a prior time line

waiver was agreed to), they would not agree to any additional waivers of time.

15 15. Neither Grievant nor Grievant's representative agreed to waive the statutory time period for issuing a Level One decision.

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.**

If default occurs, Grievant is presumed to have prevailed, and is entitled to the relief requested, unless Respondent is able to state a defense to the default or demonstrate the remedy requested is either contrary to law or contrary to proper and available remedies. W. Va. Code § 6C-2-3(b)(2). Of course, if Respondent demonstrates that a default has not occurred because it was prevented from meeting the time lines for one of the reasons listed in W. Va. Code § 6C-2-3(b)(1), Grievant will not receive the requested relief.

W. Va. Code § 6C-2-4(a)(3) provides the following guidance on level one hearings:

> **The chief administrator shall hold a level one hearing within fifteen days of receiving the grievance. A level one hearing is a recorded proceeding conducted in private in which the grievant is entitled to be heard and to present evidence; the formal rules of evidence and procedure do not apply, but the parties are bound by the rules of privilege recognized by law. The parties may present and cross-examine witnesses and produce documents, but the number of witnesses, motions and other procedural matters may be limited by the chief administrator. *The chief administrator shall issue a written decision within fifteen days of the level one hearing*.**

Emphasis added. The Level One hearing occurred on January 10, 2008. Pursuant to statutory direction, the subsequent decision should have been issued to Grievant on, or prior

to, February 1, 2008. Grievant did not receive the decision until February 8, 2008, (postmark on the decision was February 7, 2008). Respondent admits the Level One decision was not issued within fifteen working days of the Level One Hearing.

It is settled that Respondent provided Grievant with the Level One response to his grievance outside the statutorily prescribed time frame. However, Respondent avers that it was relieved of the fifteen day time limit for providing a decision, thus, no actionable default occurred in the facts of this case. 156 C.S.R. 1, section 156-1-7, discusses a claim for default and indicates that an employer may justify a default by presenting a statutory excuse for not responding timely. W. Va. Code § 6C-2-3(b) provides that a grievant may prevail by default if a required response is not made by the employer within established time limits "*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.*" Emphasis added.

Grievant counters that neither she nor her representative waived the fifteen day time period, established by W. Va. Code § 6C-2-4(a), requiring that the chief administrator shall issue a written decision within fifteen days of the level one hearing.

In dispute in this case is whether Respondent was relieved of the applicable obligation to issue a decision within fifteen days by Grievant's failure to object to Respondent's request to waive time. The burden of proof to establish waiver is on the party claiming the benefit of such waiver, and is never presumed. *Leo v. Dep't of Envtl. Protection*, Docket No. 03-DEP-235DEF (Oct. 8, 2003) (Citations omitted). Respondent's Counsel highlights that in the available portion of the Level One hearing, the transcript clearly indicates the Grievant was asked if it was OK to waive the time constraint due to the Superintendent being very busy. The transcript does not provide a response from Grievant or Grievant's representative. Respondent argues the lack of an objection by Grievant or Grievant's representative constitutes a waiver.

The concept of an actual waiver of one's established rights implies a voluntary act. *Smith v. Bell,* 129 W. Va. 749, 760, 41 S.E.2d 695, 700 (1947). "A waiver of legal rights will not be implied except upon clear and unmistakable proof of an intention to waive such rights.'. . . Furthermore, "the burden of proof to establish waiver is on the party claiming the benefit of such waiver, and is never presumed." *Protesta v. U. S. Fidelity & Guar. Co.,* 202 W. Va. 308,

315, 504 S.E.2d 135, 142 (1998) (Citations omitted.). This Grievance Board has held on numerous occasions that an agreement to extend the timeliness for issuance of a decision is binding upon the parties when made during a formal, recorded hearing and constitutes a valid waiver of the statutory requirement. *Parker v. W. Va. Dep't of Health & Human Resources*, Docket No. 99-HHR-296D (Nov. 30, 1999); *Bowyer v. Bd. of Trustees*, Docket No. 99-BOT-197D (July 13, 1999); *Jackson v. Hancock County Bd. of Educ.*, Docket No. 99-15-081D (May 5, 1999). *See Duruttya v. Bd. of Educ.*, 181 W. Va. 203, 382 S.E.2d 40 (1989).

Although Respondent purports that Grievant agreed to waive her rights in regard to the time frame for the Logan County's BOE response, there was no evidence that the Grievant desired to waive the time frame for the issuance of the Level One decision. In fact, sworn testimony by the Grievant and Grievant's representative at the default hearingon May 2, 2008, verifies that there was no intent to waive the time frame for the Level One response. Grievant and Grievant's representative, under oath, testified that they had a prior agreement to not extend the time frame for Respondent's future actions. It has been held by the Grievance Board that time lines may be extended by the agreement of the parties. *Gerencir v. Kanawha County Bd. of Educ.,* Docket No. 01-20-500D (Nov. 30, 2001); *Mullins v. Kanawha County Bd. of Educ.,* Docket No. 01-20-038D (April 10, 2001). However, there is no evidence that Grievant agreed to waive the time frame for the issuance of the Level One decision. (See footnote 2) **Although Respondent's Counsel made a statement in regard to waiving the time limits at the beginning of the hearing, this does not constitute a valid waiver. Some affirmative step to clearly indicate that Grievant wishes to waive her rights must occur. Otherwise, there is only a presumption of waiver and, under the law, a waiver is never implied. To find Grievant has waived the time frames, there must be clear, unmistakable proof. *Criner v. Dep't of Transp.,* Docket No. 06-DOH-274D (2007).**

Respondent did not establish that Grievant waived the applicable time frame within which it was to issue the Level One decision.

In addition to the foregoing discussion, the following conclusions of law are appropriate in this matter:

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). When a grievant asserts that his employer is in default, the grievant must establish that a default occurred, by a preponderance of the evidence. Once the grievant establishes that a default occurred, the employer may show that it was prevented from responding in a timely manner as a direct 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).

2 2. West Virginia Grievance procedure requires that a level one decision be issued within fifteen days of the level one hearing. W. Va. Code § 6C-2-4

3 3. The concept of an actual waiver of one's established rights implies a voluntary act. *Smith v. Bell*, 129 W. Va. 749, 760, 41 S.E.2d 695, 700 (1947). "'A waiver of legal rights will not be implied except upon clear and unmistakable proof of an intention to waive such rights.' . . . Furthermore, 'the burden of proof to establish waiver is on the party claiming the benefit of such waiver, and is never presumed.'" (Citations omitted). *Potesta v. U.S. Fidelity & Guar. Co.*, 202 W. Va. 308, 315, 504 S.E.2d 135, 142 (1998). It has been held by this Grievance Board that time lines may be extended by the actions of the grievant and by the agreements of the parties. *Gerencir v. Kanawha County Bd. of Educ*., Docket No. 01-20-500D (Nov. 30, 2001); *Mullins v. Kanawha County Bd. of Educ*., Docket No. 01-20-038D (Apr. 10, 2001). 4 4. Grievant established that Respondent did not timely provide a Level One decision on her grievance within the time limit specified in W. Va. Code § 6C-2-4(a).

5 5. Respondent did not prove Grievant waived the time frames with which it had to respond.

6 6. Respondent did not prove a statutory excuse to the default.

7 7. Respondent defaulted at Level One of the grievance procedure.

Accordingly, this default is GRANTED, and Respondent may proceed to show that the remedy sought by Grievant is contrary to law or contrary to proper and available remedies. The parties are directed to confer with one another and provide the Grievance Board with at least three mutually agreeable dates for scheduling the remedy hearing, no later than November 15, 2008.

Date: October 24, 2008

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Landon R. Brown

Administrative Law Judge

Footnote: 1

W. Va. Code § 6C-2-4(2) states "the chief administrator shall hold the conference or hearing, as requested by the grievant, within ten days of receiving the grievance and issue a written decision within fifteen days of the conference or hearing."

Footnote: 2

The sworn affidavits of Respondent's Counsel and the Level One Hearing Examiner, submitted in this default proceeding among other information, provided that a statement was made and Grievant did not object to Respondent's request. Neither the Level One Transcript nor the affidavits establish Grievant expressed a desire to agree to waive applicable time constraints for the issuance of the Level One decision.