WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

CONNIE BROWNING,
Grievant,

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

LOGAN COUNTY BOARD OF EDUCATION,
Respondent.

DECISION

Connie Browning ("Grievant") filed a level one grievance on September 26, 2007, against her employer, Respondent Logan County Board of Education ("Respondent"), alleging entitlement to a Licensed Practical Nurse Instructor's position at the Ralph R. Willis Career-Technical Center. She seeks as relief to be placed in the position, with back pay. Grievant alleged a default occurred at level one of the grievance procedure. After a hearing on the issue of default was held on May 2, 2008, the undersigned issued an Order Granting Default dated October 24, 2008. Thereafter, a hearing was scheduled at the Grievance Board's office in Charleston, West Virginia, on January 12, 2009, for the purpose of determining whether the remedy requested by Grievant is proper, available or contrary to law. Grievant's representative was Susan Lattimer Adkins, Grievance Manager, WV Professional Educators Association. Respondent was represented by its counsel, Leslie Tyree, Esquire.

On January 9, 2009, Respondent's Counsel advised the Grievance Board by email that Respondent "no longer wish to pursue [the] contrary to law [action] in this matter." And further, "the hearing" scheduled "is no longer needed." Given Counsel's representations,

and no objection from Grievant, this matter became mature for consideration on or about January 12, 2009.

Synopsis

Grievant bid on a Licensed Practical Nurse Instructor's position at the Ralph R. Willis Career-Technical Center and was not the successful applicant. A grievance was filed. Further, Grievant filed for default regarding the grievance, in that a level one decision was not rendered within fifteen days after the level one hearing. Default was found in the facts of the matter. As a result of default, Grievant prevailed on the merits, establishing that she should have been placed in a LPN Instructor's position. Respondent did not contest the remedy requested by Grievant. The relief requested was found to be proper, available and not contrary to law. Accordingly, the remedy requested by Grievant is granted.

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

Findings of Fact

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. 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. Cecilia Mays was the successful applicant for the position in discussion. She commenced the duties of the position on or about September 24, 2007.

4. Respondent was found to have defaulted on the instant grievance at level one as evidenced by a default order entered on October 24, 2008, by the West Virginia Public Employees Grievance Board.

5. The relief Grievant requested in her grievance filing was stated "to be placed in the position of LPN Instructor at the Ralph R. Willis Career-Technical Center with all wages, benefits due me retroactive to the hiring date of this position."

6. A remedy hearing was duly scheduled for January 12, 2009, where Respondent could put forth evidence and argument regarding whether the remedy requested by Grievant is proper, available or contrary to law.

7. On January 9, 2009, Attorney Tyree communicated via e-mail with the West Virginia Public Employees Grievance Board and represented that Respondent "no longer wish to pursue [the] contrary to law [action] in this matter."

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). If Respondent demonstrates one of the defenses provided in W. VA. CODE § 6C-2-3, Grievant will not receive the requested relief.

The level one hearing occurred on January 10, 2008. Respondent admitted the level one decision was not issued within fifteen working days of the level one hearing. 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 did not successfully argue a defense to this action. Respondent did not establish that Grievant waived the applicable time frame within which it was to issue the level one decision. Default was found in the facts of this case. *See Browning v Logan Count Bd. Of Educ*, Docket No. 2008-0567-LogED (October 24, 2008).

This is now a default remedy matter. "In making a determination regarding the remedy, the administrative law judge shall determine whether the remedy is proper, available and not contrary to law." W. VA. CODE § 6C-2-3(b)(2). Grievant prevailed on the merits, establishing that she should have been placed in the position of Licensed Practical Nurse Instructor at the Ralph R. Willis Career-Technical Center. Respondent did not establish that the relief requested is contrary to law or contrary to proper and available remedy. Respondent did not pursue a contrary to law action in this matter. The undersigned Administrative Law Judge finds that the remedy requested by Grievant is proper, available and not contrary to law. Grievant is entitled to be placed into a Licensed Practical Nurse

Instructor's position at the Ralph R. Willis Career-Technical Center. Further, Respondent shall award Grievant all applicable back pay and benefits retroactive to the date Cecilia May was placed in the position.

The following conclusions of law support the decision reached:

Conclusions of Law

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). 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). *See Browning v Logan Count Bd. Of Educ*, Docket No. 2008-0567-LogED (October 24, 2008).

2. As a result of default, Grievant prevailed on the merits, establishing that she should have been placed in the position of LPN Instructor at the Ralph R. Willis Career-Technical Center.

3. Subsequent to a finding that default occurred, a respondent may establish that the remedy requested by the prevailing grievant is contrary to law or contrary to proper and available remedies. W. VA. CODE § 6C-2-3(b)(2).

4. In making a determination regarding the remedy, the administrative law judge shall determine whether the remedy is proper, available and not contrary to law. W. VA. CODE § 6C-2-3(b)(2).

5. Respondent has not contested the remedy sought by Grievant in this matter. Respondent did not make a showing that the remedy requested by Grievant is contrary to law or contrary to proper and available remedies.

6. The remedy requested by Grievant in this matter is proper, available and not contrary to law.

Accordingly, Grievant Browning's grievance is **GRANTED**, and Respondent is **ORDERED** to place her into a Licensed Practical Nurse Instructor's position at the Ralph R. Willis Career-Technical Center, with applicable back pay and benefits.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by WEST VIRGINIA CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: January 27, 2009

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Landon R. Brown
Administrative Law Judge