THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

DONNA JOY,
Grievant,

v. **Docket No. 2017-2478-JefED**

JEFFERSON COUNTY BOARD OF EDUCATION,
Respondent.

ORDER GRANTING DEFAULT AND REMEDY REQUESTED

Grievant, Donna Joy, filed a written Notice of Default against her employer, Respondent, Jefferson County Board of Education, on or about August 17, 2017, regarding the grievance she filed at Level One on June 23, 2017. The Notice of Default asserts that a Level One Decision was not issued in the time frame established by WEST VIRGINIA CODE § 6C-2-4-(a)(3). It is uncontested that a timely written decision was not issued by Superintendent Bondy Shay Gibson. A hearing was held on November 17, 2017, at the Grievance Board's Westover office, before the undersigned, for the purpose of taking evidence on the issue of the remedy stage of this proceeding. Grievant appeared *pro se*. Respondent appeared by its Superintendent of Schools, Bondy Shay Gibson, and by its counsel, Tracey B. Eberling, Steptoe & Johnson PLLC. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on December 22, 2017.

Synopsis

Grievant argues that a default occurred at Level One of the grievance process because the decision was not issued within fifteen days after the conclusion of the conference as required by statute. Respondent acknowledges that a timely written decision was not issued by Superintendent Gibson. The issue in this case is the continuation of a Focused Support Plan and Grievant's request that this plan be removed. The record established that Grievant is entitled to this relief as it is neither contrary to law nor contrary to proper and available remedies. Accordingly, for the limited purpose of this proceeding, Respondent is ordered to remove the Focused Support Plan.

The following Findings of Fact are based upon the record of this case.

Findings of Fact

1. Grievant was hired by Respondent to teach math full-time at Jefferson High School for the 2012-2013 school year.

2. During the 2013-14 school year, former Jefferson High School Principal Howard Guth conducted observations of Grievant. Due to a perceived unsatisfactory work performance, Grievant was placed on a Focused Support Plan.

3. At the end of the 2013-2014 school year, Assistant Principal Mary Beth Group took over the responsibility of supervising Grievant. Ms. Group met with Grievant and her representative to discuss the implementation of a Corrective Action Plan. Grievant and her representative asserted that there were procedural errors in the process so Ms. Group, on behalf of Respondent, agreed that Grievant would be placed on a Focused Support Plan for the 2014-2015 school year instead of a Corrective Action Plan.

4. Grievant took a personal leave of absence for most of the 2014-2015 school year.

5. Due to changes in administration at both Jefferson High School and the central office, Grievant was not placed on a Focused Support Plan at the beginning of the 2015-2016 school year.

6. On January 26, 2017, Nicole Shaffer, Instructional Data Analyst for Secondary Mathematics and Coordinator for the county school system, met with Grievant and her representative and placed Grievant on a Focused Support Plan due to Grievant's continued failure to meet certain performance standards.

7. After complaints by Grievant's representative, Respondent's Chief Human Resources Officer agreed that Ms. Group, who had returned from leave, would take over the task of observing Grievant and that Ms. Shaffer would no longer be involved in the process.

8. Superintendent Gibson determined that Ms. Group needed help in working with Grievant and enlisted the assistance of Lee Ebersole, Coordinator of Federal Program and School Improvement.

9. After meeting with Grievant and her representative, Grievant was placed on a Focused Support Plan on June 5, 2017, which was to commence with the start of the 2017-18 school year. In that Focused Support Plan, Mr. Ebersole was designated as the administrator responsible for supporting Grievnt.

10. Grievant took a leave of absence prior to the start of the school year and has not returned to work as of December 18, 2017.

Discussion

Grievants who allege a default at a lower level of the grievance process have 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. *Browning v. Logan County Bd. of Educ.*, Docket No. 2008-0567-LogED (Oct. 24, 2008). "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).

The term "response," as used in the default provision, not only refers to the obligation to render decisions within the statutory time limits, but to the holding of conferences and hearings within proper limits as well. *Hanlon v. Logan County Bd. of Educ.*, 201 W. Va. 305, 496 S.E.2d 447 (1997). The issue to be decided at this time is whether a default occurred, and, if so, whether the employer has a statutory excuse for not responding within the time required by law. *See Dunlap v. Dep't of Envtl. Protection*, Docket No. 2008-0808-DEP (Dec. 8, 2008).

Default grievances are generally bifurcated. In the first hearing, it is determined whether a default actually occurred. If a default is found to have occurred, a second hearing is conducted to determine whether any of the remedies sought by Grievants are "contrary to law or contrary to proper and available remedies." W. VA. CODE § 6C-2-3(b)(2). If default occurs, Grievants prevail, and are 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. *See* W. VA. CODE § 6C-2-3(b)(2). 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 West Virginia Code § 6C-2-3(b)(1), Grievants are not entitled to relief. If there is no default or the default is excused, the grievance will be remanded to the appropriate level of the grievance process.

Respondent acknowledges that default occurred when a timely written decision was not issued by Superintendent Gibson. Respondent goes on to argue that to grant the remedy of rescinding the June 5, 2017, Focused Support Plan would be a grave disserive to students entrusted to Respondent. Counsel asserts that undoing the work of administrators aimed at helping Grievant meet state performance standards is not an appropriate penalty for the procedural deficiency of failing to issue a timely written response to a Level One grievance.

The undersigned agrees that those arguments would be pertinent if the case was to be decided on the merits; however, a default has been granted and the only question is whether the relief sought is contrary to law or contrary to proper and available remedies. The only relief requested by Grievant is the removal of the Focused Support Plan initially imposed on June 5, 2017. With all due respect to counsel for Respondent, nothing about this request can be viewed as contrary to law or contrary to proper and available remedies. Finally, the record established that Grievant has been on leave away from teaching, intermittently, for almost, if not, an entire school year. Perhaps with the removal of this old

Focused Support Plan the parties can revisit their objectives once Grievant returns to teaching.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. In the remedy phase of a default grievance, the respondent has the burden of proving by a preponderance of the evidence, that the remedies requested by the grievant are contrary to law or contrary to proper and available remedies. W. VA. CODE § 6C-2-3(b); Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2008); *See Hoff v. Bd. of Trustees*, Docket No. 93-BOT-104 (June 30, 1994) and *Flowers v. W.Va. Bd. of Trustees*, Docket No. 92-BOT-340 (Feb. 26, 1993), cited in support of this proposition in *Lohr v. Div. of Corrections*, Docket No. 99-CORR-157D (Nov. 15, 1999).

2. Respondent failed to demonstrate by a preponderance of the evidence that the remedy requested by the Grievant was contrary to law or contrary to proper and available remedies.

Accordingly, the relief requested by Grievant is **GRANTED**.

Respondent is **ORDERED** to rescind the Focused Support Plan imposed on Grievant on June 5, 2017.

Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. *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 W. VA. 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 17, 2018

Ronald L. Reece
Administrative Law Judge