

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**ROOHI KHAN and JILL ZURBUCK,
Grievants,**

v.

Docket No. 2019-0327-CONS

**RANDOLPH COUNTY BOARD OF EDUCATION,
Respondent.**

ORDER GRANTING DEFAULT REMEDY

Grievants, Roohi Khan and Jill Zurbuch, filed this action against their employer on September 5, 2018, challenging the superintendent's directive that they provide school counseling services to students located at the county's Alternative Learning Center. After a Level One conference held on September 21, 2018, a Level One decision was issued on October 16, 2018. Grievants filed a claim of default due to the decision being issued past the statutory deadline. Respondent conceded that a default occurred, but requested a hearing on the availability or legality of the remedy. A hearing was conducted before the undersigned on February 22, 2019, at the Randolph County Development Center, Elkins, West Virginia, pursuant to the Notice of Remedy Hearing. Grievants appeared in person and by their counsel, John Everett Roush, AFT-West Virginia. Respondent appeared by its counsel, Denise M. Spatafore, Dinsmore & Shohl, LLP. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on March 21, 2019.

Synopsis

The record indicates that Respondent defaulted, and has acknowledged that it has no statutorily accepted excuses for its default. Since Grievants have prevailed on the merits by default, the sole issue is whether the remedy sought by Grievants is contrary to law or contrary to proper and available remedies. The Respondent has the burden of proving this affirmative defense by a preponderance of the evidence. The record established that the remedy requested by Grievants is available and not contrary to law. Contrary to Respondent's assertion, Grievants do not request that the students at the alternative school be deprived of counseling services. Grievants simply request that they not be required to leave their place of assignment to provide those services without their consent and without notice and some opportunity to be heard on the assignment. Accordingly, the remedy is granted.

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

Findings of Fact

1. Grievants are employed by the Respondent as counselors at Elkins Middle School.
2. At or near the beginning of the 2018-2019 school term, Grievants were directed to alternate going to the Alternative Learning Center one day a week to provide counseling for the students at that center.
3. Grievants were not assigned to any other location than Elkins Middle School.

4. Grievants had not been placed on the transfer/unassigned list for the 2018-2019 school years.

5. Grievants did not consent to the assignment to the Alternative Learning Center in Elkins, West Virginia.

6. Grievants carried out the directive to go to the Alternative Learning Center one day a week and continued to do so to the present.

7. The record established a variety of options for providing counseling service to the students at the Alternative Learning Center. These include posting a position for a counselor, full or part-time, at the school or contracting those services to counselors not employed by Respondent. Both of these options have been utilized in the past to provide counseling services to the students at the Alternative Learning Center.

Discussion

Respondent has acknowledged that default has occurred in this grievance. Once the default is established, a hearing is set to address the remedy requested by Grievants. At that hearing, Respondent has the opportunity of showing that the remedy requested is contrary to law or contrary to proper and available remedies. These issues are sometimes matters of law that may not require the presentation of evidence, but to the extent that proof is required, Respondent has the burden of proving this affirmative defense by a preponderance of the evidence. Public Employees Grievance Board, 156 C.S.R. 1 § 3 (2018). 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) p. 3 of 8. *Dunlap v. W. Va. Dep't of Env'tl. Prot.*, Docket No. 2008-0808-DEP (Mar. 20, 2009).

The undersigned agrees with counsel for Grievants that the remedy requested is available and is not contrary to law. Contrary to arguments of Respondent, Grievants do not request that the students at the Alternative Learning Center be deprived of counseling services. Grievants simply request that they not be required to leave their place of assignment without their consent and some opportunity to be heard on the assignment. The record established that there are other ways that counseling services could be provided to the students at the Alternative Learning Center. The alternative methods of providing counseling services to the students may require an expenditure of funds by Respondents. But, as counsel aptly points out, the standard is not whether the remedy sought will cost money. The standard is whether the remedy sought is legal and available. In the instant case, the remedy sought meets the criteria of availability and legality.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. In the remedy phase of a default grievance, Respondent has the burden of proving, by a preponderance of the evidence, that the remedies requested by Grievants 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 (2018); *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). *Dunlap v. W. Va. Dep't of Env'tl. Prot.*, Docket No. 2008-0808-DEP (Mar. 20, 2009).

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

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

Respondent is **ORDERED** to rescind the directive that Grievants provide counseling services to the Alternative Learning Center for the balance of the current school year, and develop an alternative means to provide counseling to the students at the Alternative Learning Center as it has done in the past that are available and consistent with law.

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: March 29, 2019

Ronald L. Reece
Administrative Law Judge