THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

DONNA KAY WOOD,
Grievant,

v. **Docket No. 2019-1789-KanED**

KANAWHA COUNTY BOARD OF EDUCATION,
Respondent.

ORDER DENYING DEFAULT AND REMANDING TO LEVEL ONE

Grievant, Donna Kay Wood, is employed by Respondent, Kanawha County Board of Education, as a teacher at South Charleston High School. On June 21, 2019, Grievant filed this action against Respondent alleging:

> Constructive demotion without being informed from Applied Arts Dept. Head and Functional demotion as Reprisal from Fine Arts Department Head for my dissatisfaction of inequitable distributing of students forcing me to teach IB Art + Art 2, 3, & 4 in one class. And Reprisal by lowering my teacher evaluation.

Grievant requested the following relief:

> Continue with full pay for both Fine Arts and Applied Art Department Heads. Redistribution of student for 1B to be separate class (I am still willing to teach this on my prep period as I have in past) and reevaluated by other.

Grievant requested a level one conference. On August 21, 2019, Grievant filed for default judgment on the basis that the level one conference had not yet been held. A hearing on the request for default was held on November 4, 2019, before Administrative Law Judge Landon R. Brown[1]. Grievant appeared *pro se*. Respondent appeared by its counsel, Lindsey D.C. McIntosh, General Counsel. This matter became mature for

[1] This matter was reassigned on January 8, 2020, for administrative reasons.

decision on December 6, 2019, upon final receipt of the parties' written Proposed Findings of Fact and Conclusions of Law.

Synopsis

Grievant is a teacher employed by the Kanawha County Board of Education. Grievant contends that default occurred at level one of the grievance process because the requested conference was not held within ten days of Respondent receiving the grievance. Respondent counters that Grievant's request for default is untimely. The record established that Grievant failed to timely file her request for default. This matter is remanded to allow the parties to conduct a Level One conference.

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

Findings of Fact

1. Grievant filed this action on June 21, 2019, requesting a level one conference.

2. Grievant is a teacher who, as a 200-day employee, does not report to work during the summer months. Grievant's regular return to work was August 6, 2019.

3. Respondent received a copy of the grievance form on June 25, 2019. On July 5, 2019, Paralegal Kimberly Harper began attempting to schedule the conference for a date when all necessary parties would be back to work.

4. By letter dated July 23, 2019, Respondent scheduled the level one conference for August 6, 2019, Grievant's first day back to work.

5. The August 6, 2019 conference was cancelled and attempts were made to reschedule.

6. On August 19, 2019, in consultation with and by agreement of Grievant, Respondent rescheduled the conference for August 23, 2019.

7. Later in the day, after agreeing to the date, Grievant refused the date stating she wanted five days written notice of the conference, so the conference was cancelled at Grievant's insistence.

8. On August 21, 2019, Grievant filed a copy of her original level one grievance, checking the box for default judgment without including any information regarding why she believed Respondent was in default.

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. *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 chief administrator shall hold a conference within ten days of receiving the grievance." W. VA. CODE § 6C-2-4(a)(2).

Therefore, Grievant may seek relief for default based upon the failure to hold the conference within the time period mandated by statute. To assert default, "within ten days of the default, the grievant may file with the chief administrator a written notice of intent to proceed directly to the next level or to enforce the default." W.VA. CODE § 6C-2-3(b)(2). A grievant's failure to timely file notice of default will bar default. *Coats-Riley v. W. Va. State Tax Dep't*, Docket No. 2014-1745-DOR (May 4, 2015); *Fletcher v. Div. of Highways*, Docket No. 2017-0673-DOT (Apr. 14, 2017).

For purposes of the grievance process, "'[d]ays' means working days exclusive of Saturday, Sunday, official holidays and any day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided for by statute, rule, policy or practice." W.VA. CODE § 6C-2-2(c).

Respondent does not dispute it failed to hold the conference within the statutory timeframes but asserts that Grievant's request for default was itself untimely. The calculation of days per the statute shows that Respondent was required to hold the conference by July 5, 2019. Respondent did not hold the conference by that date, although it appears Respondent's failure was due to the attempt to hold the conference on a date when all necessary parties had returned to work for the school year. Grievant was required to file for default within ten days of that failure, which would have been July 19, 2019.

Grievant argues that she did not become aware of the default until the conversation to schedule the conference on August 19, 2019, when she asked the paralegal, "Are you

not out of compliance in scheduling this?" Grievant also asserts that, prior to filing her grievance on June 21, 2019, a Grievance Board staff member told her that "summer days do not count that days were for my work days."

Both Grievant's assertions are internally inconsistent. Grievant obviously was aware before her conversation on August 19, 2019, that the conference had not been held timely because she was the one that made that accusation in the conversation. As to the assertion about summer days, if she was questioning her time to file during the conversation with Grievance Board staff and was told that days during the summer do not count it is inconsistent that Grievant would then file her grievance on the very same day of the conversation.

Regardless, neither of Grievant's assertions justify Grievant's delay in claiming default. "'[A]s a general rule, ignorance of the law. . .will not suffice to keep a claim alive.' *Reeves v. Wood County Bd. of Educ*., Docket No. 91-54-337 (Dec. 30, 1991). '[T]he date a Grievant finds out an event or continuing practice was illegal is not the date for determining whether his grievance is timely filed. Instead, if he knows of the event or practice, he must file within fifteen days of the event or occurrence of the practice. *Harris v. Lincoln County Bd. of Educ.*, Docket No. 89-22-49 (Mar. 23, 1989). *See also Buck v. Wood County Bd. of Educ*., Docket No. 96-54-325 (Feb. 28, 1997)." *Lynch v. W. Va. Dep't of Transp*., Docket No. 97-DOH-060 (July 16, 1997) ***aff'd***, Kan. Co. Cir. Ct. Docket No. 97-AA-110 (Jan. 21, 1999). A grievant's "failure to timely file his grievance is not excused by the fact that he did not know he could or should file one." *Cyrus v. Dep't of Health and Human Res.*, Docket No. 01-HHR-425 (Sept. 26, 2001). The same reasoning applies to filing a claim of default. While Grievant may or may not have understood her right to claim

default until later in the process, she was aware the conference had not been scheduled at the time of the default and that is the relevant date to calculate her time to file to claim default.

As to the assertion that Grievant's time to file should not run while she is on summer break, the question is whether Grievant's workplace can be considered "closed." Either way, Grievant cannot prevail in default. If her workplace cannot be considered "closed," then Grievant's claim of default is untimely. If her workplace can be considered "closed," then Respondent's scheduling of the conference cannot be considered untimely because the time to schedule the conference would also have been enlarged by summer break.

Further, while it is not clear if Respondent obtained Grievant's agreement to waive the timeframes originally, Grievant thereafter did waive the timeframes while working with Respondent to reschedule the conference. The record of this case indicates that the Respondent notified Grievant on July 23, 2019, that a conference would be scheduled for August 6, 2019 and it appears Grievant did not object to that date as that is the date she would return to work. Grievant was notified that the conference needed to be rescheduled by phone on July 31, 2019. Grievant called Respondent on August 5, 2019, and left a voicemail that she would be available on August 8th and August 9th. To her credit, Grievant continued to work with Respondent through the scheduling process and agreed to make herself available in August when she was back in school and when all other parties were available. However, Grievant then caused the cancellation of the second scheduled conference herself when she insisted on technical notice for a date and time to which she had already agreed. In this instance, as Grievant had agreed to a particular

date and time pursuant to West Virginia Code §6C-2-3(o), the notice provision of West Virginia Code §6C-2-3(l) was not applicable. The first notice Respondent had that Grievant was not willing to waive the timeframes when she had previously agreed to dates outside of the timeframes was on August 19, 2019. Therefore, the undersigned finds that, under the circumstances presented, Grievant is not entitled to relief by default. Accordingly, this matter must be remanded to level one of the grievance process for a conference.

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). 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).

2. "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).

3. "The chief administrator shall hold a conference within ten days of receiving the grievance." W. VA. CODE § 6C-2-4(a)(2).

4. To assert default, "within ten days of the default, the grievant may file with the chief administrator a written notice of intent to proceed directly to the next level or to enforce the default." W.VA. CODE § 6C-2-3(b)(2). A grievant's failure to timely file notice of default will bar default. *Coats-Riley v. W. Va. State Tax Dep't*, Docket No. 2014-1745-DOR (May 4, 2015); *Fletcher v. Div. of Highways*, Docket No. 2017-0673-DOT (Apr. 14, 2017).

5. For purposes of the grievance process, "'[d]ays' means working days exclusive of Saturday, Sunday, official holidays and any day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided for by statute, rule, policy or practice." W.VA. CODE § 6C-2-2(c).

6. "'[A]s a general rule, ignorance of the law. . .will not suffice to keep a claim alive.' *Reeves v. Wood County Bd. of Educ*., Docket No. 91-54-337 (Dec. 30, 1991). '[T]he date a Grievant finds out an event or continuing practice was illegal is not the date for determining whether his grievance is timely filed. Instead, if he knows of the event or practice, he must file within fifteen days of the event or occurrence of the practice. *Harris v. Lincoln County Bd. of Educ.*, Docket No. 89-22-49 (Mar. 23, 1989). *See also Buck v. Wood County Bd. of Educ*., Docket No. 96-54-325 (Feb. 28, 1997)." *Lynch v. W. Va. Dep't of Transp*., Docket No. 97-DOH-060 (July 16, 1997) ***aff'd***, Kan. Co. Cir. Ct. Docket No. 97-AA-110 (Jan. 21, 1999). A grievant's "failure to timely file his grievance is not excused by the fact that he did not know he could or should file one." *Cyrus v. Dep't of Health and Human Res.*, Docket No. 01-HHR-425 (Sept. 26, 2001).

7. Grievant is not entitled to relief by default as her claim for default was not timely filed.

Accordingly, the request for default is **DENIED**. This grievance is **REMANDED** to level one for a conference before the chief administrator or designee. Respondent shall hold the conference within ten days of Respondent's receipt of this order.

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 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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

DATE: January 24, 2020

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Billie Thacker Catlett
Chief Administrative Law Judge