CYNTHIA JACKSON,

Grievant,

v. **DOCKET NO. 99-15-081D**

HANCOCK COUNTY BOARD OF EDUCATION,

Respondent.

ORDER DENYING DEFAULT

On February 24, 1999, Cynthia Jackson (Grievant) submitted an appeal to level four of the grievance procedure, alleging that Respondent had failed to issue a level two decision within the time lines set forth in W. Va. Code § 18-29-4. She requests that she be granted relief by default pursuant to the provisions of W. Va. Code §18-29-3(a).

On April 14,1999, a hearing was conducted before the undersigned Administrative Law Judge in this Grievance Board's office in Wheeling, West Virginia. Grievant represented herself, and Respondent was represented by counsel, William Fahey. The parties agreed that the undersigned would address the sole issue of whether Respondent is in default, reserving the question of whether the remedy sought by Grievant is contrary to law or clearly wrong. The parties presented oral arguments, waiving written arguments, and this matter became mature for decision at the conclusion of the hearing.

The following findings of fact pertinent to resolution of the default issue have been determined based upon a preponderance of the credible testimonial and documentary evidence presented during the Level IV hearing.

Findings of Fact

1. Grievant filed a grievance at level one in January of 1999, alleging that theHancock County Board of Education (HCBOE) had wrongfully removed her name from the substitute teachers' list.

2. A level two hearing was held before Danny Kaser, Hearing Examiner, (See footnote 1) on

February 2, 1999.

3. At the conclusion of the level two hearing, Mr. Kaser asked Grievant if it would be acceptable to her that a decision be issued within five days after receipt of the level two transcript. Grievant responded that this was acceptable. Level II Tr. at 7.

4. Grievant filed a notice of default at level two on February 11, 1999.

5. The level two transcript was completed on February 17, 1999.

6. A level two decision was issued on February 19, 1999.

Discussion

The default provision applicable to school personnel grievances is contained in W. Va. Code § 18-29-3(a), which states in pertinent part:

> If a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required in this article, unless prevented from doing so directly as a result of sickness or illness, the grievant shall prevail by default. Within five days of such default, the employer may request a hearing before a level four hearing examiner for the purpose of showing that the remedy received by the prevailing grievant is contrary to law or clearly wrong. In making a determination regarding the remedy, the hearing examiner shall presume the employee prevailed on the merits of the grievance and shall determine whether the remedy is contrary to law or clearly wrong in light of the presumption. If the examiner finds that the remedy is contrary to law, or clearly wrong, the examiner may modify theremedy to be granted so as to comply with the law and to make the grievant whole.

This Grievance Board has previously held that we were without jurisdiction to decide default matters at level four under the education grievance procedure. See Smith v. Bd. of Directors, Docket No. 93-BOD-051 (Feb. 17, 1993). The ruling in Smith, supra, was based upon the finding that the Grievance Board was without authority to administer the lower levels of the grievance procedure and had no authority to enforce a default, in the absence of a request for a hearing regarding the default remedy, filed by the employer. However, effective July 1, 1998, the West Virginia Legislature gave the Grievance Board authority to administer levels two and three of the grievance procedure for education employees. W. Va. Code § 18-29-5 (1998) provides that “[t]he Board shall administer the grievance procedure . . . as provided for in section four of this article.” Based upon this provision, the Grievance Board has jurisdiction to hear a grievant's claim seeking relief by default, based upon the employer's alleged procedural violation, i.e., failure to respond to the grievance within the time limits contained in W. Va. Code § 18-29-4. To the extent that Smith, supra, and its progeny reached a

different conclusion, they are hereby overruled.

The burden of proof is upon the grievant asserting a default has occurred to prove the same by a preponderance of the evidence. Moore v. Dept. of Health and Human Resources, Docket No. 98-HHR-382D (Dec. 8, 1998). If a default has occurred, then the grievant wins, and Respondent may request a ruling at level four regarding whether the relief requested should be granted. If a default has not occurred, then the grievant may proceed to the next level of the grievance procedure. W. Va. Code § 18-29-4(b) states that a level two decision must be issued within five days of the conclusion of the level two hearing. Grievant contends that, because the level two decision was not issued within five days of February 2, 1999, the date of the hearing, HCBOE is in default. HCBOE does not dispute that the level two decision was not issued until February 19, 1999. However, it argues that no default has occurred, because Grievant agreed to extend the level two timelines until a transcript was received. Accordingly, issuance of the decision on February 19, only two days after the transcript's completion on February 17, complied with the time frames agreed upon by the parties.

At the level four hearing, Grievant was questioned as to whether the level two transcription was correct insofar as the exchange between her and Mr. Kaser regarding the timeline extension. She stated that the transcript is, in fact, correct, and the exchange went as follows:

> THE HEARING EXAMINER: Okay. Then, we'll request that once we receive a transcript, we'll issue a decision in five days. Will the five days be acceptable to you?
>
> MRS. JACKSON: Yes.

Level II Tr. at 7. Grievant's only explanation for her allegation of default is that she simply did not understand what Mr. Kaser meant, and she believed she would receive the decision within five days of the hearing.

W. Va. Code § 18-29-3(a) provides that “the specified time limits may be extended by mutual written agreement.” Waiver of the strict statutory timelines is a common occurrence within the context of the grievance procedure. This practice benefits both parties by allowing employers sufficient time to give grievances careful attention and care,rather than “rushing” to judgment. Grievant's testimony at the level four hearing is difficult to understand. While she admits that the discussion set forth above did occur as stated, she claims that she still believed the level two decision would be issued

within five days of the hearing. This is somewhat difficult to comprehend, when Mr. Kaser specifically asked Grievant if she would allow five days from receipt of the transcript for a decision to be issued, with which she agreed. Although the agreement to extend the timelines was not written, Grievant clearly agreed to the extension during a formal, recorded hearing, while she was under oath. This is sufficient to constitute a valid waiver of the time to issue a decision under the statute.

The time periods in the grievance procedure are not jurisdictional in nature and are subject to equitable principles of tolling, waiver and estoppel. Gaskins v. W. Va. Dept. of Health, Docket No. 90-H-032 (Apr. 12, 1990) (citing cases). This Grievance Board has frequently applied such principles, specifically estoppel, to toll the time for filing a grievance. See, e.g., Lilly v. Raleigh County Bd. of Educ., Docket No. 94-41-195 (Nov. 28, 1994). Such principles have similarly been applied in evaluating default cases. Harmon v. Division of Corrections, Docket No. 98-CORR-284D (Oct. 6, 1998). In order to prevail in a claim of estoppel, a party must show that there was a representation made or information given by the opposing party which was relied upon, causing an alteration of conduct or change of position to the first party's detriment. Ara v. Erie Insurance Co., 182 W. Va. 266, 387 S.E.2d 320 (1989).

Unquestionably, HCBOE relied upon Grievant's representation that it was acceptable to extend the time limitations for issuing the level two decision until five daysafter receipt of the transcript. In relying upon Grievant's expression of understanding in this regard, HCBOE delayed issuing that decision beyond the statutory time limitation of five days after the hearing. Therefore, the doctrine of estoppel would bar Grievant from now claiming that a default occurred.

Accordingly, the undersigned concludes that Grievant has failed to meet her burden of proof in this default claim. Her admitted agreement to allow an extension of the statutory timeline at level two prohibits any claim that a default occurred at that level.

Because HCBOE normally waives consideration of grievances at level three, the parties have agreed that this matter may proceed to a level four hearing on the merits.

Conclusions of Law

1. “If a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required in this article, unless prevented from doing so directly as a result of sickness or illness, the grievant shall prevail by default.” W. Va. Code § 18-29-3(a).

2. The specified time limits in the grievance statute may be extended by mutual agreement of the parties. See W. Va. Code § 18-29-3(a).

3. Grievant voluntarily agreed at the level two hearing to an extension of the applicable statutory timelines for issuing a level two decision.

4. The level two decision was issued within the time period agreed upon by the parties, so Grievant is barred from claiming a default occurred.

5. Effective July 1, 1998, the Grievance Board has authority to administer levels two and three of the grievance procedure for education employees. W. Va. Code § 18-29-5 (1998).

6. To the extent that Smith v. Bd. of Directors, Docket No. 93-BOD-051 (Feb. 17, 1993), and its progeny held that the Grievance Board has no jurisdiction to decide or enforce defaults which occur at the lower levels of the grievance procedure, they are overruled.

Accordingly, Grievant's request for a determination of default under W. Va. Code § 18-29-3(a) is **DENIED**. This matter will remain on the Grievance Board docket and proceed to a level four hearing on the merits. The Grievance Board does not consider this Order to be a final order or decision which is appealable to circuit court under the provisions of W. Va. Code § 18-29-7.

Further the parties are directed to confer with each other and notify this office by May 12, 1999, of at least three mutually agreeable dates for scheduling of a level four hearing.

Date: May 5, 1999 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Pursuant to W. Va. Code §18-29-2(l), only employees of the West Virginia Education and State Employees Grievance Board are properly referred to as "hearing examiners." Personnel who conduct hearings at the lower levels of the grievance procedure should be referred to as "grievance evaluators."