DALE D. BROWN, SR.,

Grievant,

v. **Docket No. 00-30-051**

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Dale D. Brown, Sr., employed by the Monongalia County Board of Education (MCBOE) as a Truck Driver, filed a level four grievance on February 2, 2000, in which he alleged that he was misclassified, in violation of W. Va. Code §18A-4-8; that he had substituted for the Warehouse Clerk without receiving compensation at the higher pay grade, in violation of W. Va. Code §18A-4-15; that he had not been credited with the number of vacation days to which he is entitled, in violation of MCBOE policy; and, that MCBOE had defaulted pursuant to W. Va. Code §18-29-3(a). For relief, Grievant seeks retroactive wages based upon the sought after reclassification, wages for the days he substituted for the Warehouse Clerk, payment for additional vacation days, and interest on all amounts at the statutory rate.

A level four hearing was conducted at the Grievance Board's Morgantown office on June 2, 2000, at Grievant's request. Grievant was represented by John E. Roush, Esq., of WVSSPA, and MCBOE was represented by Harry M. Rubenstein, Esq., of Kay Casto and Chaney. The matter became mature for decision July 17, 2000, the due date for responses to proposed findings of fact and conclusions of law.

Default

This matter has a rather unusual procedural history which leads to the default claim filed at level four. The record does not include a grievance form filed at level one; however,the parties appear to agree that the claim was initiated in February or March 1999. Grievant asserts that after no action was taken at levels one or two, he decided to skip level three, and advanced his claim to level four. The Grievance Board did not receive this grievance, and Grievant did not provide a copy of it then, or since that time. Instead, Grievant notified MCBOE Superintendent Michael Vetere of his intent to leave his employment, and requested resolution of the issues. By undated letter, Superintendent

Vetere advised Grievant that he was not entitled to any relief, and requested that he either return to work, or officially resign from his employment. Grievant returned to work and continued to engage in discussions with Assistant Superintendent Jacob Mullett, and Grievant's immediate supervisor, Terry Hawkins. A level two hearing was conducted on December 7, 1999. A decision issued on January 24, 2000, and received by Grievant on January 26, 2000, denied the grievance in part, and granted it to the extent that Grievant's claim regarding vacation days was to be reviewed. Grievant appealed his claim to level four on February 2, 2000.

The burden of proof is upon the grievant asserting a default has occurred to prove the same by a preponderance of the evidence. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id. If any doubt exists as to whether relief should be granted, such doubt should be resolved in favor of a finding of no default in order that the case may be heard on the merits. McDaniel v. Romano, 155 W. Va. 875, 878, 190 S.E.2d 8, 11 (1972). The issue of default in a grievance filed by an education employee is addressed in W. Va. Code §18-29-3(a), which provides in pertinent part, "[i]f 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."

Although Grievant states in his proposed findings of fact and conclusions of law that the claim of default is “relatively straightforward”, the undersigned finds it to be less than clear considering the procedural history of this matter recounted previously. While default was claimed in the level four appeal, it was not addressed by either party at the level four hearing, and was not discussed in post-hearing submissions. Since the issue was not raised in the level two transcript, it would appear that the claim is made in reference to the level two decision. At first glance, it is apparent that the decision was not issued within five working days of the hearing, as is required by W. Va. Code §18-29-4(b); however, a review of the level two transcript establishes that both parties agreed to waive the time lines until January 24, 2000. (Level II Trans. pp. 64-65.) The certificate of service attached to the level two decision establishes that it was issued on January 24, 2000.

The Grievance Board has previously held that the default provisions are triggered by the failure to

issue a written decision within five days of a level two hearing. W. Va. Code § 18-29-3(i) states that the decision is to be "transmitted" to the grievant within the time lines set forth in the statute. The grievance procedure does not speak to when the decision must be received by a grievant. Gillum v. Dep't of Transp./Div. of Highways, Docket No. 98-DOH-387D (Dec. 2, 1998). In this case, the parties agreed that the hearingevaluator could have until January 24, 2000, to issue the decision, and the record indicates that it was transmitted on that date. Grievant has failed to prove that MCBOE defaulted.

Classification

Grievant does not assert that he is improperly classified as a Truck Driver, at pay grade E. However, he states that he has a short run and that he additionally performed the duties of Warehouse Clerk, pay grade D, until he was told to stop this activity. Since Warehouse Clerk is in a lower pay grade than the position he presently holds, Grievant requests the same monthly stipend of $25 which is paid to Chuck Kennedy, the Warehouse Clerk/Inventory Supervisor. Grievant testified at level two that he helped with the inventory, stocked shelves, and otherwise performed all the duties completed by Mr. Kennedy, with the exception of work done on the computer. Grievant estimates that he performed these duties for approximately two and one-half years, until he was told to stop, sometime in Spring 1999. Nevertheless, Grievant argues that he should have continued to have the opportunity to engage in this work, and notes that the inventory was no longer processed as quickly when he stopped performing these duties.

MCBOE asserts that it is not required to compensate Grievant for the additional duties he voluntarily assumed without expectation of being paid. Even if it is found that Grievant was expected to perform some inventory and/or supply duties, MCBOE argues that any such incidental duties would not render Grievant misclassfied if the remainder of his duties fall within his current classification. Finally, MCBOE notes that Grievant was previously multiclassified as a Truck Driver/General Maintenance, and that his classification was revised to the single classification of Truck Driver as the result of a prior grievance in which he proved that he was in and out of schools and driving more than hewas delivering. MCBOE concludes that the duties Grievant performs on a daily basis are accurately described by the Truck Driver job classification.

Because misclassification is a non-disciplinary matter, Grievant bears the burden of proving his claim by a preponderance of the evidence. Midkiff v. Lincoln County Bd. of Educ., Docket No. 95-22-

262 (March 3, 1996); Purdue v. Mercer County Bd. of Educ., Docket No. 92-27-280 (March 29, 1993). In order to prevail in a misclassification grievance, an employee must establish that his or her duties more closely match those of a classification defined by W. Va. Code §18A-4-8 other than the classification he or she currently holds. Pope v. Mingo County Bd. of Educ., Docket No. 91-28-0678 (July 31, 1992). However, an employee who simply performs some duties normally associated with a higher classification may not be considered misclassified per se. Hatfield v. Mingo County Bd. of Educ., Docket No. 91-29-077 (April 15, 1996). Incidental duties which require an inconsequential amount of an employee's time will not warrant a higher classification, if the remainder of one's duties are accurately described by one's current classification. Graham v. Nicholas County Bd. of Educ., Docket No. 93-34-224 (Jan. 6, 1994).

Grievant did not provide a job description for Warehouse Clerk, nor did he offer the testimony of Mr. Kennedy regarding his duties in this capacity. The record does include a job description for Truck Driver. Under the “Essential Functions” section, number sixteen states that the incumbent will “[p]erform warehouse duties as needed when not delivering mail/supplies and equipment.” In light of the fact that Grievant's testimony was that his duties as a Truck Driver were completed prior to any work in the warehouse, it is concluded that any duties of a Warehouse Clerk were minimal, and did not render Grievant misclassified. Further, Grievant does not claim that he was ever directed to perform theseduties. On the contrary, he indicates that he voluntarily assisted Mr. Kennedy. An employer is not required to compensate an employee for work voluntarily completed. Reed v. Kanawha County Bd. of Educ., Docket No. 99-20-111 (May 27, 1999); Anderson v. Gilmer County Bd. of Educ., Docket No. 95-11-197 (Aug. 1, 1995); Vencill v. Kanawha County Bd. of Educ., Docket No. 93-20-196 (May 26, 1994).

Step-up Work

Grievant next claims that he stepped-up and completed the duties of Warehouse Clerk/Inventory Supervisor in Mr. Kennedy's absence. Grievant originally estimated that he had stepped-up between seventy and eighty days over a two and one-half year period, but amended that number to fifty-seven days in his post-hearing submission. Grievant ceased this activity when so directed in Spring 1999. MCBOE asserts that Grievant was never assigned to step-up and perform additional duties in Mr. Kennedy's absence, and would not have been so assigned outside his classification. Any duties which were performed were done so on a voluntary basis, and MCBOE declines to compensate

Grievant for work not assigned or undertaken with the expectation of being paid.

The provisions of W. Va. Code §18A-4-15 includes what is often referred to as the "step up" provision, which states:

[I]f there are regular service employees employed in the same building or working station as the absent employee and who are employed in the same classification category of employment, such regular employees shall be first offered the opportunity to fill the position of the absent employee on a rotating and seniority basis with the substitute then filling the regular employee's position.

The pertinent portion of W. Va. Code §18A-4-15 was interpreted by this Grievance Board in Terek v. Ohio County Board of Education, Docket No. 91-35-160 (Aug. 30, 1991), wherein the administrative law judge stated:

[T]he proviso gives regular employees an opportunity to fill an absent employee's job and allows for assigning the substitute employee the position of the regular employee who remains on the job. The proviso is applied when these three events occur: One, a regular employee is absent, two, a substitute is necessary for temporary employment, and, three, an existing regular employee moves temporarily to the absent employee's position instead of having the substitute fill it. The end result of applying the proviso is to place the substitute in the position of the regular employee who is filling the absent employee's job.

In the instant case, the three relevant events did not occur. Although the Warehouse Clerk/Inventory Supervisor, a regular employee, was absent, it was not necessary to assign a substitute to that position. In Mr. Kennedy's absence, MCBOE simply permitted his work to go undone until his return. Further, while Grievant now claims that he was entitled to the classification of Warehouse Clerk during that period of time, in fact he did not hold the classification of Warehouse Clerk/Inventory Supervisor, and was not eligible to “step up” into another classification. See Miller v. Brooke County Bd. of Educ., Docket No. 98-05- 343 (Apr. 26, 1999). While Grievant's efforts to assist in the warehouse are commendable, he does not indicate that he was asked to perform any additional duties, or that he had discussed filling in for Mr. Kennedy with anyone. He stated only that no one told him not to fill in until Spring 1999. Under these circumstances, Grievant must be viewed as having volunteered to perform any additional duties, and is not entitled to any additional compensation. Reed supra; Anderson supra; Vencill supra.

Vacation

Grievant claims that he was entitled to four weeks of vacation beginning in the 1995- 1996 school year, but did not receive the full amount of time until the 1999-2000 school year. MCBOE asserts that Grievant's vacation time was reviewed in compliance with the level two decision, and determined that calculation had been made using the actual number of days worked. If the proper calculation is made using the days under contract, MCBOE concedes that Grievant is entitled to one week of vacation from the 1996-1997 school year. MCBOE asserts that Grievant was awarded twenty days of vacation beginning the 1997-1998 school year.

MCBOE Policy GDBE, “Service Personnel Vacations”, provides that vacation time for twelve month, full-time employees shall be accrued at a rate of ten days per year for years one through nine, fifteen days per year from years ten through fourteen, and twenty days per year for fifteen years and beyond. The Policy specifically addresses how vacation time is to be calculated for an employee who has worked under a shorter contract and transfers into a position with a twelve month contract.

Number of years worked in county times contracted days of employment plus the first year of 261 days and then divided by 261.

Example: An employee has been employed for nine (9) years under a 220 day contract. This employee is recommended for a 261 contract and works one (1) year in this position.

220 X 9 = 1980 + 261 = 2241

2241 divided by 261 - 8.58 (nine (9) years) which would result in earning ten (10) days annually for vacation.

NOTE: Any fraction exceeding .5 will be rounded up to the next whole number.

Using this formula, Grievant asserts the following:Although Grievant did not work the full 215 days of his employment term each year prior to 1988-1989, he did work at least 133 days in each. (See footnote 1) Multiplying each year from 1981-1982 through 1987-1988 (7 years) by 215 equals 1505. Adding 261 days for the 1988-1989 school year bring us to the figure 1766. Dividing this figure by 261 gives us the figure 7.6. Rounding this figure up to 8 we get the number of years service Grievant had prior to 1989-1990. Adding the actual number of days worked in 1988-1989 (233) to 1505 to account for the fact that Grievant did not hold a 261 contract for the entire year yields the figure 1738.

Dividing 261 into this figure gives us 7.65 which is again rounded up to 8. Using these figures, Grievant was entitled to four weeks of vacation in the 1995-1996 school year.

(Grievant's Proposed Finding of Fact No. 13)

Grievant's calculation is flawed because it includes every year of service as credit toward accrued vacation, notwithstanding the length of the employee's contract. Grievant appears to acknowledge this in his Proposed Finding of Fact No 12 which states, “Grievant's fifteenth year of employment with Respondent was the 1995-1996 school year.” As evidenced by the example provided in the Policy, when an employee was previously assigned an employment term of less than twelve months, MCBOE does not grant a full year of credit for vacation purposes. The Policy does not speak to situations such as this, in which an employee transfers to a twelve month position during a school year; however, proration appears to be fair and reasonable. Since the date of Grievant's transfer was not made part of the record, it is impossible to determine exactly how much credit Grievant should be given for the 1988-1989 school year. In any event, MCBOE's calculation of Grievant's vacation time also appears to be flawed in that it was based on actual days worked rather than for the contracted period of employment. It is not clear why the number of days worked was utilized. The Policy does not specifically address this issue; however, no reference is made to days worked. Because the calculations in the Policy all reference the term of employment, and absent any authority to the contrary, vacation time would properly be calculated based upon the employee's contract term. MCBOE concedes that if the contract term is used rather than days worked, Grievant is entitled to one additional week of vacation for the 1996-1997 school year. Grievant offered no time sheets, pay stubs, or any other evidence in support of his claim that he did not receive four weeks of vacation time prior to the 1999-2000 school year, contrary to MCBOE's records which indicate that he began receiving four weeks of vacation in the 1997-1998 school year. Therefore, Grievant is entitled to compensation for one week of vacation earned in the 1996-1997 school year, plus interest.

In addition to the foregoing discussion it is appropriate to make the following formal findings of fact and conclusions of law.

Findings of Fact

1. Grievant was first employed by MCBOE as ten month employee, and classified a Custodian, in December 1981.

2. During the 1988-1989 school year Grievant was transferred to a General Maintenance position at the warehouse. As the result of a separate, unrelated grievance, Grievant was subsequently reclassified as a Truck Driver.

3. On a number of occasions when Warehouse Clerk/Inventory Supervisory Chuck Kennedy was absent from work, Grievant performed some of Mr. Kennedy's clericalduties. Specifically, he would answer the telephone and take messages, advise sales representatives that Mr. Kennedy was not available, and respond to requests. These activities were performed in addition to the deliveries he makes to the schools. Grievant was never requested or approved to perform Mr. Kennedy's duties, and when he advised administrators that he was performing them, he was directed to stop.

4. In addition to Grievant's duties as a Truck Driver, during a period of two to two and one-years, he regularly performed duties in the warehouse. These duties primarily consisted of stocking and maintaining the inventory, and filling orders. Grievant specifically did not perform any duties which required use of the computer. The duties performed at the warehouse were in addition to Grievant's full-time duties as a Truck Driver. Grievant was not directed or requested to perform these duties, and when he advised an administrator that he was completing them, he was directed to stop.

5. When Grievant was awarded a twelve month employment term he began to accrue paid vacation time consistent with MCBOE policy.

6. MCBOE calculated Grievant's vacation time based upon actual days worked rather than on the length of his employment term.

7. Grievant received ten vacation days per year during the 1989-1990, 1990- 1991, and 1991-1992 school years. He received fifteen vacation days per year during the 1992-1993, 1993-1994, 1994-1995, 1995-1996, and 1996-1997 school years, and twenty days of vacation during the 1997-1998 and 1998-1999 school years.

8. At the level two hearing, Grievant agreed to waive the statutory time lines in which a decision was required to be issued. He agreed to allow the hearing evaluator until January 24, 2000, to issue the decision. 9. A level two decision was sent to Grievant by certified mail on January 24, 2000.

10. Grievant resigned from his employment with MCBOE effective February 1, 2000.

Conclusions of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving each element of his grievance by a preponderance of the evidence. Procedural Rules of the W. Va.

Educ. & State Employees Grievance Bd. 156 C.S.R. 1 §4.19 (1996); Holly v. Logan County Bd. of Educ., Docket No. 96-23-174 (Apr. 30, 1997); Hanshaw v. McDowell County Bd. of Educ. Docket No. 33-88-130 (Aug. 19, 1988). See W. Va. Code §18-29-6.

2. "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).

3. “Within five days of receiving the decision of the immediate supervisor, the grievant may appeal the decision to the chief administrator, and such administrator or his or her designee shall conduct a hearing . . . within five days of receiving the appeal and shall issue a written decision within five days of such hearing.” W. Va. Code § 18-29-4(b).

4. The statutory timelines may be extended by mutual agreement, or by the actions of the parties. Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995); Bowyer v. Bd. of Trustees, Docket No. 99-BOT-197D (July 13, 1999).

5. Grievant failed to prove that MCBOE defaulted at level two. 6. In order to prevail on a claim that his position is misclassified, an employee must establish that his duties more closely match those of another classification defined by W. Va. Code §18A-4-8, other than that under which his position is categorized. Pierantozzi v. Brooke County Bd. of Educ., Docket No. 96-05-061 (May 31, 1996); Porter v. Hancock County Bd. of Educ., Docket No. 95-15-493 (May 24, 1994).

7. "[S]imply being required to undertake some responsibilities normally associated with a higher classification, even regularly, does not render a grievant misclassified, per se." Midkiff v. Lincoln County Bd. of Educ., Docket No. 95-22-262 (March 3, 1996).

8. Incidental duties which require an inconsequential amount of an employee's time will not warrant a higher classification, if the remainder of one's duties are accurately described by one's current classification. Graham v. Nicholas County Bd. of Educ., Docket No. 93-34-224 (Jan. 6, 1994).

9. Grievant failed to prove by a preponderance of the evidence that he was entitled to multiclassification as Truck Driver/Inventory Clerk.

10. "[I]f there are regular service employees employed in the same building or working station as the absent employee and who are employed in the same classification category of employment, such regular employees shall be first offered the opportunity to fill the position of the absent employee on a rotating and seniority basis with the substitute then filling the regular employee's

position." W. Va. Code §18A-4-15.

11. Grievant failed to establish by a preponderance of the evidence that, in accordance with W. Va. Code §18A-4-15, MCBOE was obligated to allow Grievant the opportunity to "step up" into Mr. Kennedy's position. 12. Under the facts and circumstances presented by Grievant, any duties of Warehouse Clerk which he performed in Mr. Kennedy's absence or presence, were voluntary, with no reasonable expectation that he would receive any additional compensation. See Vencill, supra

13. Grievant is entitled to compensation for one additional week of vacation earned during the 1996-1997 school year.

Accordingly, the grievance is **GRANTED** in part and MCBOE is ORDERED to reimburse Grievant for one week of earned vacation. The grievance is **DENIED** regarding all other matters.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Monongalia County and such appeal must be filed within thirty (30) days of receipt of this decision. W.Va. Code §18-29-7. Neither the West Virginia Education and State 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

Date: August 21, 2000 _____

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

The Policy requires that the employee work a minimum of 133 days in a contract year to earn credit for a year of experience for vacation purposes.