MARTHA J. DONNELLAN,

Grievant,

v. **Docket No. 02-17-003D**

HARRISON COUNTY BOARD OF EDUCATION,

Respondent,

and

SHARON DOUGLAS,

Intervenor.

ORDER DENYING DEFAULT

Grievant, Martha Donellan, employed by the Harrison County Board of Education (HCBE) as a Secretary III, filed a level one grievance on April 20, 2001, after Intervenor, Sharon Douglas, was selected for the position of Director/Coordinator of Food Services. On December 19, 2001, Grievant appealed the Level II decision denying her grievance to Level III. On January 7, 2002, Grievant filed a “Notice of Default”. HCBE appealed to level four on January 8, 2002, and a hearing was conducted in the Grievance Board's Morgantown office on February 25, 2002, for the purpose of determining whether a default occurred and, if so, whether HCBE had a statutory excuse to the default claim. Grievant was represented by Charles G. Johnson, Esquire, HCBE was represented by Basil R. Legg, Jr., Esquire, and Intervenor was represented by John E. Roush, Esquire. This matter became mature for decision upon receipt of the parties' written arguments on April 5, 2002.

The following facts are derived from the record in its entirety.

Findings of Fact

___1. Grievant is employed by HCBE as a Secretary III assigned to the Food Service Department located in Respondent's central office. Grievant holds a 250 day employment contract. 2. Intervenor was previously employed by HCBE as Director/Coordinator of Title I, but was reassigned as Director/Coordinator of Food Service in early 2001.

3. Grievant initiated these proceedings in April, 2001. Upon receipt of a level two decision

denying her claim, Grievant appealed the matter to level three by delivering it to HCBE's Personnel Department on December 19, 2001.

4. Grievant failed to provide the reason(s) for her appeal to level three, as is required by statute.

5. Grievant failed to notify Intervenor that the grievance had been appealed to level three.

6. HCBE next met on January 7, 2002, at which time it waived consideration of the grievance.

7. Grievant filed a “Notice of Default” on January 7, 2002.

8. Grievant worked on December 20, 21, 26, 27, and January 2, 3, 4, and 7.

Discussion

The default provision for education employees is found in W. Va. Code § 18-29-3(a), which provides:

A grievance must be filed within the times specified in section four of this article and shall be processed as rapidly as possible. The number of days indicated at each level specified in section four of this article shall be considered as the maximum number of days allowed and, if a decision is not rendered at any level within the prescribed time limits, the grievant may appeal to the next level: Provided, That the specified time limits may be extended by mutual written agreement and shall be extended whenever a grievant is not working because of such circumstances as provided for in section ten, article four, chapter eighteen-a of this code. Any assertion by the employer that the filing of the grievance at level one was untimely must be asserted by the employer onbehalf of the employer at or before the level two hearing. 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 that presumption. If the examiner finds that the remedy is contrary to law, or clearly wrong, the examiner may modify the remedy to be granted so as to comply with the law and to make the grievant whole.

The burden of proof is upon the grievant to prove by a preponderance of the evidence that a default

occurred, i.e., the grievance evaluator required to respond to a grievance at a specified level failed to make a required response in the time limits required in this article. Bloomfield v. Ohio County Bd. of Educ., Docket No. 01-35-554D (Dec. 20, 2001); Birmingham v. James Rumsey Technical Inst., Docket No. 01-MCVTC-391D (Sept. 14, 2001). If the grievant establishes that the required response was not made in a timely manner, Respondent may then show that the delay was due to a statutory excuse of sickness or illness, or that Grievant agreed to waive the time lines. If the grievant proves that a default occurred, and no valid response is offered by respondent, a subsequent hearing will be scheduled to determine 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. To the extent that any previous level four decisions placed the burden of proof on the respondent, they are hereby overruled. Grievant claims a default occurred at Level III because the Level III hearing was not held within the statutory time periods, and the Level III decision was not issued within the statutory time periods. Grievant calculates that after filing the appeal on December 19, 2001, she worked December 20, 21, 26, and 27, 2001, and on January 2, 2002, and, therefore, a level three hearing should have been conducted on or before January 2, 2002. Applying Grievant's calculation further, she concludes the decision of HCBE to waive review at level three on January 7, 2002, was issued eight working days after the appeal was filed.

W. Va. Code § 18-29-4(c) provides that, at Level III:

Within five days of receiving the decision of the chief administrator, the grievant may appeal the decision to the governing board of the institution or may proceed directly to level four. An appeal to the governing board shall set forth the reasons why the grievant is seeking a level three review of the decision of the chief administrator. Within five days of receiving the appeal, such governing board may conduct a hearing in accordance with section six of this article, may review the record submitted by the chief administrator and render a decision based on such record or may waive the right granted herein and shall notify the grievant of such waiver. Any decision by the governing board, including a decision to waive participation in the grievance, shall be in writing and shall set forth the reasons for such decision, including the decision to waive participation in the grievance. If a hearing is held under the provisions of this subsection, the governing board shall issue a decision affirming, modifying or reversing the decision of the chief administrator within five days of such hearing.

Respondent argues that there was no default because the appeal was not properly filed with

HCBE as an entity, but was re-filed at level two, to be forwarded to HCBE. Respondent further asserts that a decision was issued within five working days of the 200 day employment term. Intervenor concurs that the appeal was not perfected with thePresident of HCBE, or even served upon Superintendent Carl Friebel, and she was not served with the appeal. Intervenor suggests that level three appeals must be processed at the next scheduled board meeting, and, noting that consideration is waived in the vast majority of grievances appealed to level three, it would be inequitable for a grievant to prevail by default at that level.

W. Va. Code § 18-29-2(b) defines "days" as:

days of the employee's employment term or prior to or subsequent to such employment term exclusive of Saturday, Sunday, official holidays or school closings in accordance with section two [§ 18A-5-2], article five, chapter eighteen-a of this code.

While this definition requires that processing occur at different times for different employees, depending on their terms of employment, it does not create any inequity as asserted by HCBE.

There is no statutory guidance as to where, or to whom, a level three appeal is to be filed. Further, the level two decision was not made part of the record, so it is not known whether HCBE complied with its duty to direct Grievant where to file a level three appeal. (See footnote 1) The suggestion that the matter is to be filed with the board of education during a public meeting is not feasible. Since boards of education typically meet only twice a month it may be impossible for an appeal to be made within the time lines. Although the superintendent serves as the level two hearing evaluator, he is also secretary for the board, and filing a level three appeal with him, or the personnel department, is a practical option. Even if suchfiling is not in full technical compliance with the statute, it substantially complies by putting the appropriate individuals on notice of the appeal.

Nevertheless, Grievant's claim of default must be denied because she failed to comply with the statutory requirement that she provide the reason(s) for an appeal to level three. Code § 18-29-4(c) provides that "[a]n appeal to the governing board shall set forth the reasons why the grievant is seeking a level three review of the decision of the chief administrator." (Emphasis added.) This language was added to the grievance statute in 1992, and is clear and unambiguous, requiring no interpretation. Thus, the grievance procedure provides the grievant the option of appealing the level two decision to level three, or proceeding directly to level four. However, if the level three option is

selected, this provision places an additional responsibility on the grievant to include the reason(s) why review at that level is being requested. Grievant did not properly file a level three appeal because she did not include the stated reason(s) for the request. A grievant may not prevail in a default claim when she has not complied with the statutory requirements by telling the board why it should hear her grievance rather than waiving participation.

In addition, it is appropriate to make the following conclusions of law.

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 burden of proof is upon the grievant to prove by a preponderance of the evidence that a default occurred, i.e., the grievance evaluator required to respond to agrievance at a specified level failed to make a required response in the time limits required in this article. Bloomfield v. Ohio County Bd. of Educ., Docket No. 01-35-554D (Dec. 20, 2001); Birmingham v. James Rumsey Technical Inst., Docket No. 01-MCVTC-391D (Sept. 14, 2001). If the grievant establishes that the required response was not made in a timely manner, Respondent may then show that the delay was due to a statutory excuse of sickness or illness, or that Grievant agreed to waive the time lines.

3. A grievant may not prevail in a default claim when she has not filed an appeal at level three that sets forth the reasons why she is seeking level three review, in compliance with W. Va. Code § 18-29-4(c).

Accordingly, the default claim is **DENIED**, and the parties ORDERED to confer, and to provide this Grievance Board, by June 12, 2002, with five dates when all parties are available for a hearing on the merits.

DATE: June 6, 2002 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

W. Va. Code § 18-29-3(i) provides that "if the grievant is denied the relief sought, the decision shall include the name of the individual at the next level to whom appeal may be made."