EDNA BIGGERSTAFF,

Grievant,

v.

DOCKET NO. 02-29-384D

MINGO COUNTY BOARD OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Edna Biggerstaff, filed the following grievance against her employer, the Mingo County Board of Education ("Board"), on September 13, 2002:

> Grievant was regularly employed as a cook at Lenore School. Grievant was placed on the transfer list because the school at which she was working during the 2001-2002 school year was to [be] closed and the children transferred to another school and building. The closure turned out to be a paper measure and the building at which Grievant worked remained open with student[s] attending being served by another employee who outbid Grievant for the new "Lenore K-8" school at the new site. Grievant contends that she should have been permitted to remain at her school/building. She alleges a violation of West Virginia Code §§ 18A-4-8b(c) & 18A-2-7.
>
> Relief sought: Grievant seeks reimbursement for all damages as a result of her assignment to Gilbert Grade School rather than Lenore and seeks reinstatement to Lenore.

The grievance was denied at level one on September 14, 2002. (See footnote 1) A level two hearing was held on October 30, 2002, and the grievance denied by decision datedNovember 15, 2002. (See footnote 2) Grievant by-passed level three pursuant to W. Va. Code § 18-29-4, and appealed to level four on November 25, 2002, where she asserted her claim for default at level two. By agreement of the parties, a level four hearing was held on the issue of default and on the merits

on January 29, 2003. This matter became mature for decision on March 7, 2003, the deadline for the parties' submission of proposed findings of fact and conclusions of law and responses. Grievant was represented by John E. Roush, Esq., West Virginia School Service Personnel Association, and the Board was represented by Harry M. Rubenstein, Esq., Kay, Casto & Chaney.

SUMMARY OF EVIDENCE

Level Two Grievant's Exhibits

None.

Level Two Board Exhibits

Ex. 1 -

Notice of Public Hearings W. Va. Code § 18-5-13a, Closing and Consolidation of Lenore Grade School and Closing and Consolidation of Lenore Middle School.

Ex. 2 -

November 2, 2001 letter from David Stewart to Mr. David Temple.

Ex. 3 -

Service Personnel Vacancies 2002-2003 School Year, Posting No. 1, March 7, 2002.

Ex. 4 -

Portion of March 21, 2002 Board Agenda, Mingo County Schools Service Personnel.

Ex. 5 -

Service Seniority for 2001-2002 School Year.

Ex. 6 -

March 22, 2002 letter from David Temple to Edna Biggerstaff.

Ex. 7 -

April 2, 2002 letter from Edna Biggerstaff to Randy Keathley.

Ex. 8a -

April 12, 2002 letter from Randy Keathley to Edna Biggerstaff.

Ex. 8b -

April 23, 2002 Schedule for Hearings.

Ex. 9 -

April 23, 2002 Personnel Hearing, Edna Biggerstaff.

Ex. 10 -

Portion of April 30, 2002 Board agenda, Service Personnel.

Ex. 11 -

May 1, 2002 letter from David Stewart to David Temple.

Ex. 12 -

May 3, 2002 letter from David Temple to Edna Biggerstaff.Ex. 13 -
Portion of June 6, 2002 Board Agenda, Service Personnel.

Ex. 14 -

July 16, 2002 letter from Nell Hatfield to Edna Biggerstaff.

Level Four Grievant's Exhibits

Ex. 1 -

Certified Mail Receipt and Return Receipt Requested to David Temple.

Ex. 2 -

November 25, 2002 letter from Delmer Blankenship to John Roush, Esq.

Level Four Board Exhibits

Ex. 1 -

January 28, 2003 memorandum, Explanation of Completion Status

Lenore K-8 School, with exhibit, from Williamson Shriver Gandee Architects.

Ex. 2 -

January 28, 2003 letter from Thomas L. Young to Brenda Skibo.

Ex. 3 -

October 7, 2002 letter from Kimberly Levy to W. C. Totten.

Ex. 4 -

October 9, 2002 fax transmittal from Kimberly Levy to W. C. Totten.

Testimony

Grievant testified in her own behalf, and presented the testimony of Patricia Grubb and Delmer Blankenship The Board presented the testimony of Nell Hatfield, Stephen W. Gibson, Tommy Young, Randy Keathley, Brenda Skibo, and William Totten.

Based upon a review of the record in its entirety, I find the following facts have been proven by a preponderance of the evidence.

FINDINGS OF FACT

1. Grievant is employed by the Board as a cook.

2. Grievant bid on and received a position as a Cook II at Lenore Middle School in January 2002.

3. At that time, construction was underway on a new Lenore K-8 school, and it was anticipated that Lenore Middle School would be closed at the end of the 2001-2002 school year.

4. In March 2002, Grievant was notified she would be considered for transfer as a result of the proposed consolidation of her school with surrounding schools into the newly-constructed building. 5. Grievant requested and had a hearing before the Board on April 23, 2002. She was placed on the transfer list on April 30, 2002, and subsequently, on June 6, 2002, she was assigned to Gilbert Grade School, effective the beginning of the 2002-2003 school term. LII Board Ex. 13.

6. The Board had posted a Cook II position for the new Lenore K-8 school, and Mattie Fletcher, a regular employee with more seniority than Grievant, was placed in that position.

7. The construction of the new Lenore K-8 School began in August 2001, and the projected completion date was August 20, 2002. Due to several construction delays caused by occurrences that were unforeseen, the project was delayed approximately 150 calendar days, and the school was not ready when students returned for the 2002-2003 school year. LIV Board Ex. 1. In fact, the new school did not open until January 27, 2003. LIV Board Ex. 2.

8. Because of these delays, it was necessary to keep the old Lenore Middle School open in order to accommodate the students in that area.

9. Personnel that had been hired for Lenore K-8, including Mattie Fletcher, were ordered to report to Lenore Middle School at the beginning of the 2002-2003 school year, and served there until the Lenore K-8 school opened in January 2003.

10. Grievant initiated this grievance on September 13, 2002, when she discovered Mattie Fletcher was working at Lenore Middle School.

11. The grievance was denied at level one by Delmer Blankenship, Principal of Gilbert Grade School, on September 14, 2002; however, he mistakenly dated his response September 19, 2002. Mr. Blankenship normally holds his level one responses five days,and post-dates them, in order to give him time to deal with the grievances. In this instance, he post-dated his response, but gave it to Grievant on September 14, 2002.

12. Grievant appealed to level two on September 16, 2002, and her appeal was received at the Superintendent's office September 17, 2002.

13. W. C. Totten, the Hearing Evaluator assigned by the Superintendent, attempted to contact Grievant a couple of times at her school, but kept missing her.

14. He eventually called Grievant at her home on October 1, 2002, to schedule the level two hearing, and he issued an October 2, 2002, letter setting the hearing for October 7, 2002.

15. At Grievant's request, the October 7, 2002, hearing was continued, and the hearing was conducted on October 30, 2002.

16. At level two, Grievant's counsel noted in his closing argument that it was possible the Board had defaulted in scheduling the level two hearing, but that he was not going to claim default at that time, because he needed to investigate the matter further.

17. The level two decision was issued on November 15, 2002, and Grievant appealed to level four on November 22, 2002.

18. On December 6, 2002, Grievant's counsel informed the Board in writing that a default had occurred in scheduling the level two hearing.

DISCUSSION

Grievant's default claim issue will be addressed first. The issue of default in grievances filed by education employees is within the jurisdiction of the Grievance Board. W. Va. Code § 18-29-3(a) states the following:

> (a) 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 ... § 18-29-4 ... of this article shall be considered 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 ... § 18A-4-10 ... of this code. Any assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf 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 a claim of default, the grievant bears the burden of establishing that he prevailed by default by a preponderance of the evidence. Friend v. W. Va. Dept. of Health and Human Resources, Docket No. 98-HHR-346D (Nov. 25, 1998). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing than the evidence which is offered in opposition to it. Hunt v. W. Va. Bureau of Employment Programs, Docket No. 97-BEP-412 (Dec. 31, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

Grievant claims she has prevailed by default because the Board failed to schedule a level two hearing on her grievance within the statutory time frames. Specifically, with regard to proceedings at level two under the grievance procedure for education employees, W. Va. Code § 18-29-4(b) provides as follows:

> 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 in accordance with ... § 18-29-6 ... of this article within five days of receiving the appeal and shall issue a written decision within five days of such hearing.

Grievant sent her appeal to level two on September 16, 2002, and her appeal was received in the Superintendent's office on September 17, 2002. The fifth working day following Grievant's appeal to level two was September 24, 2002, and the last day upon which a hearing could be conducted and be in compliance with the Code. There is no dispute that a level two hearing was not conducted on or before that date. However, the Superintendent's designee, Mr. Totten, did attempt to contact Grievant at her school before the end of the five-day period, although unsuccessfully. It has been previously recognized by this Grievance Board on many occasions that, when a grievance evaluator has taken steps to resolve the grievance, even if it results in a technical default, it is considered substantial compliance with the statutory time limits. Hicks v. Monongalia County Bd. of Educ., Docket No. 02-30-351D (Mar. 14, 2003); Thomas v. Clay County Health Dept., Docket No. 01-CCHD-422D (Sept. 26, 2001). As stated recently in Goff v. West Virginia Department of Transportation, Docket No. 02-DOH-245D (Sept. 10, 2002), “to find a default because the Grievance Evaluator failed to fully comply with the procedural requirements would raise form over substance in contravention of the intent of the grievance procedure.”

Importantly, it is clear Grievant was aware of her right to claim default as early as October of 2002, but she did not do so until December 6, 2002, after the level two decision was rendered, and the case had been appealed to level four. An employee is allowed topursue a default claim only if she raises it as soon as she becomes aware of the default. Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997); Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995). The grievant is also required to submit the default claim before a response to the grievance has been received. Harmon v. Fayette County Bd. of Educ., 205 W. Va. 125, 516 S.E.2d 748 (1999). It has been previously held that, even if the employee chooses to go forward with the hearing in a case in which he believes default has occurred, he can preserve his right to default by asserting it at the outset of the proceedings. See Bell v. Northern Regional Jail and Correctional Facility, Docket No. 99-CORR-054D (Apr. 14, 1999). Here, Grievant did not preserve her right by asserting a default as soon as she became aware one may have occurred. For the foregoing reasons,

Grievant is not entitled to prevail by default, and this grievance will be decided on the merits.

Grievant asserts the Board should have rescinded her transfer to Gilbert Grade School when it became aware that the opening of Lenore K-8 would be delayed past the beginning of the 2002-2003 school year, and she should have been allowed to remain at Lenore Middle School until the school's opening. The Board asserts the case is moot, and any opinion on the transfer issue would be advisory, and denies it violated any rules, statutes, laws, or policies, in transferring Grievant to Gilbert Grade School.

This Grievance Board does not issue advisory opinions. Priest v. Kanawha County Bd. of Educ., Docket No. 00-20-144 (Aug. 15, 2000); Dooley v. Dept. of Transp., Docket No. 94-DOH-255 (Nov. 30, 1994); Pascoli & Kriner v. Ohio County Bd. of Educ., Docket No. 91-35-229/239 (Nov. 27, 1991). This Grievance Board has continuously refused to deal with issues when the relief sought is “speculative or premature, or otherwise legallyinsufficient.” Dooley v. Dept. of Trans./Div. of Highways, Docket No. 94-DOH-255 (Nov. 30, 1994); Pascoli & Kriner v. Ohio County Bd. of Educ., Docket No. 91-35-229/239 (Nov. 27, 1991). Typically, a Grievant must show “an injury-in-fact, economic or otherwise” to have what “constitutes a matter cognizable under the grievance statute.” Lyons v. Wood County Bd. of Educ., Docket No. 89-54-601 (Feb. 28, 1990); Dunleavy v. Kanawha County Bd. of Educ., Docket No. 20-87-102-1 (June 30, 1987); see also Shobe, supra. "Relief which entails declarations that one party or the other was right or wrong, but provides no substantive, practical consequences for either party, is illusory, and unavailable from the [Grievance Board]. Miraglia v. Ohio County Bd. of Educ., Docket No. 92-35-270 (Feb. 19, 1993). De minimus relief is also unavailable. Carney v. W.Va. Div. of Rehab. Services, Docket No. VR-88-055 (Mar. 28, 1989)." Baker v. Bd. of Directors, Docket No. 97-BOE- 265 (Oct. 8, 1997).

Grievant acknowledges that once Lenore K-8 opened in January 2003, this grievance became moot insofar as her instatement at Lenore Middle School. However, she contends she is entitled to travel reimbursement for the difference between the distance to and from her home and Lenore Middle versus the distance to and from her home and Gilbert Grade School. An administrative law judge may "provide such relief as is deemed fair and equitable in accordance with the provisions of this article . . .". W. Va. Code § 18-29-5(b). This Grievance Board has applied this Code Section to encompass such issues as back pay, travel reimbursement, seniority, and overtime, to make grievants whole. Accord, Vest v. Bd. of Educ. of County of Nicholas, 193 W. Va. 222, 225, 227 n.11

(1995); Petty v. Kanawha County Bd. of Educ., Docket No. 00-20-154 (May 2, 2002). Grievant does not contest the legal sufficiency of the initial decision to transfer her to Gilbert Grade School. Rather, she asserts her transfer should have been rescinded once it became apparent that Lenore K-8 would not open at the beginning of the 2002- 2003 school year. West Virginia Code § 18A-4-8b was amended effective April 14, 2001, by the addition of subsection (k), as follows:

> If, prior to the first day of August after a reduction in force or transfer is approved, the reason for any particular reduction in force or transfer no longer exists as determined by the county board in its sole and exclusive judgment, the board shall rescind the reduction in force or transfer and shall notify the affected employee in writing of his or her right to be restored to his or her former position of employment. Within five days of being so notified, the affected employee shall notify the board of his or her intent to return to his or her former position of employment or the right of restoration to the former position shall terminate: Provided, That the board shall not rescind the reduction in force of an employee until all employees with more seniority in the classification category on the preferred recall list have been offered the opportunity for recall to regular employment as provided in this section. If there are insufficient vacant positions to permit reemployment of all more senior employees on the preferred recall list within the classification category of the employee who was subject to reduction in force, the position of the released employee shall be posted and filled in accordance with this section.

Three criteria must be met before this provision will allow a displaced employee to return to her former position after a reduction in force (RIF) or transfer: 1) The county board decides the reason for the RIF or transfer is no longer necessary; 2) The county board reaches that decision before the August first next following the RIF or transfer; and 3) no employees on the preferred recall list with more seniority are eligible to be placed in that position. Further, the Code leaves the determination of whether the RIF or transfer is still necessary up to the "sole and exclusive judgment" of the county board.

The evidence in this case demonstrates that the original targeted completion date for Lenore K-8 was August 20, 2002. LIV Bd. Ex. 1. Sometime shortly before August 20,2002, Mingo County experienced a large amount of rainfall which resulted in a “slip in the cut slope behind the building seat.” LIV Bd. Ex. 1. This caused an anticipated 30 day delay in the opening of Lenore K-8. Subsequently, several other unforeseen events occurred which forced the opening to be delayed until January 2003. In any event, up until the large rainfall in late August 2002, the Board anticipated Lenore K-8 would open at the beginning of the 2002-2003 school year, or at the very latest, sometime in September 2002. As the events which precluded Lenore K-8 from opening on time for the 2002-2003 school year occurred after August 1, 2002, the Board was under no statutory authority

to rescind Grievant's transfer.

Moreover, as the decision whether or not to rescind lies solely in the Board's discretion, the standard is whether the decision was arbitrary and capricious. The evaluation of a personnel decision under the arbitrary and capricious standard entails close examination of the process used to make the decision. Considerable deference must be afforded the professional judgment of those who made the decision. Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648 (1995). Baird v. Kanawha County Bd. of Educ., Docket No. 95-20-445 (Sept. 16, 1996). "In applying the 'arbitrary and capricious' standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that decision and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). Moreover, a decision of less than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, supra, at 286." Hill and Cyrus v. Kanawha County Bd. of Educ., Docket No. 96-20-362 (Jan. 30,1997). See also Wood v. Raleigh County Bd. of Educ., Docket No. 01-41-398 (Aug. 24, 2001).

The decision to maintain the personnel transactions that had taken place in anticipation of the opening of the new school, even after it became apparent in late August 2002 that the school would not open in time for the beginning of the school year, was reasonable under the circumstances, as it was not known how long it would be before the school could open. At the earliest, it could have opened September 19, 2002, which was only a few weeks into the school year. LIV Bd. Ex. 1. Unfortunately, events occurred which caused the opening to be delayed even further. None of these events was anticipated or subject to the Board's control, and the Board acted as best it could under the circumstances.

The following conclusions of law support the decision reached.

CONCLUSIONS OF LAW

1. The burden of proof is upon the grievant who claims a default to prove by a preponderance of the evidence that a default has occurred. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002). Where Respondent asserts a statutory excuse to the default, the burden of proof is upon Respondent to prove the same by a preponderance of the evidence.

2. The grievant prevails by default if a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required, unless prevented from doing so directly as a result of sickness or illness. W. Va. Code § 18-29-3(a). 3. At level two, W. Va. Code §18-29-4 requires that a hearing be conducted within five days of receipt of the appeal.

4. A good faith effort to resolve the grievance, although it results in a technical default, may be considered substantial compliance with the statutory deadlines. Thomas v. Clay County Health Dept., Docket No. 01-CCHD-422D (Sept. 26, 2001).

5. An employee is allowed to pursue a default claim only if he raises it as soon as he becomes aware of the default. Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997); Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995).

6. Due to Grievant's failure to raise the default issue as soon as she became aware of it, Grievant is not entitled to prevail by default.

7. “If, prior to the first day of August after a reduction in force or transfer is approved, the reason for any particular reduction in force or transfer no longer exists as determined by the county board in its sole and exclusive judgment, the board shall rescind the reduction in force or transfer and shall notify the affected employee in writing of his other right to be restored to his or her former position of employment.” W. Va. Code § 18A-4-8b.

8. The events which resulted in the delay of the opening of Lenore K-8 occurred after August 1, 2002; therefore, there was no statutory requirement that the Board rescind Grievant's transfer.

9. The standard for determining whether the action of the Board not to rescind a transfer is whether the decision was arbitrary and capricious. Wood v. Raleigh County Bd. of Educ., Docket No. 01-41-398 (Aug. 24, 2001). 10. The evaluation of a personnel decision under the arbitrary and capricious standard entails close examination of the process used to make the decision. Considerable deference must be afforded the professional judgment of those who made the decision. Cowen v. Harrison County Bd. of Educ., 195 W. Va. 377, 465 S.E.2d 648 (1995). Baird v. Kanawha County Bd. of Educ., Docket No. 95-20-445 (Sept. 16, 1996). "In applying the 'arbitrary and capricious' standard, a reviewing body applies a narrow scope of review, limited to determining whether relevant factors were considered in reaching that decision and whether there has been a clear error of judgment. Bowman Transp. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974); Harrison v. Ginsberg, 169 W. Va. 162, 286 S.E.2d 276 (1982). Moreover, a decision of less

than ideal clarity may be upheld if the agency's path in reaching that conclusion may reasonably be discerned. Bowman, supra, at 286." Hill and Cyrus v. Kanawha County Bd. of Educ., Docket No. 96-20-362 (Jan. 30, 1997). See also Wood v. Raleigh County Bd. of Educ., Docket No. 01-41-398 (Aug. 24, 2001).

11. Under the circumstances evidenced in this grievance, the decision of the Board not to rescind Grievant's transfer to Gilbert Grade School pending the opening of Lenore K-8 was not arbitrary and capricious.

Accordingly, this grievance is **DENIED**.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the Circuit Court of Mingo County. Any 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 andState 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.

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MARY JO SWARTZ

Administrative Law Judge

Dated: March 24, 2003

Footnote: 1

The level one decision was dated incorrectly as being issued on September 19, 2002. By letter received November 26, 2002, the principal informed counsel for Grievant that the decision had actually been given to Grievant on September 14, 2002.

Footnote: 2

Grievant's counsel noted at the level two hearing that the possibility of a default was present, but did not assert a default until further investigation.