ANGELA C. BOWMAN,

Grievant,

v. **Docket No. 02-24-403D**

MARION COUNTY BOARD OF EDUCATION,

Respondent.

Decision Denying Default

Grievant, Angela C. Bowman, a substitute employee of the Marion County Board of Education (MCBE), filed a level one grievance on November 20, 2002, in which she alleged a teaching position had been filled in violation of W. Va. Code §§ 18A-4-7and 18A-2-1, as well as State Board of Education Policy 5202. The grievance was denied at level one by Assistant Superintendent Dennis Edge on November 20, 2002, and a level two appeal was filed on November 26, 2002. By letter dated December 10, 2002, Grievant advised MCBE that she was claiming the requested relief by default. A hearing on the default was conducted at MCBE's request on January 23, 2003, at the Grievance Board's Westover office. Grievant was represented by her father, Thomas Bowman. MCBE was represented by Stephen R. Brooks, Esq., of Flaherty, Sensabaugh & Bonasso. Both parties waived the opportunity to file proposed findings of fact and conclusions of law, and the matter became mature for decision at the conclusion of the hearing.

The following findings of fact are derived from a preponderance of the evidence submitted at the default hearing.

Findings of Fact

1. Grievant, employed by MCBE as a substitute teacher, filed a level one grievance on November 6, 2002, in which she alleged violations relating to the hiring of professional personnel.

2. Grievant appeared at the level one hearing with her father, Thomas Bowman, Mr. Bowman is also an employee of MCBE, and has previously pursued grievances on his own behalf, as well as assisting other employees with grievances.

3. Mr. Edge issued a level one decision denying the grievance by placing it in the mail on November 20, 2002. (See footnote 1)

4. Grievant filed a level two appeal on November 26, 2002. By letter of the same date, Grievant requested extensive documentation relating to the grievance.

5. Upon receipt of the request for documents, Mr. Edge forwarded the matter to MCBE counsel Brooks, and contacted Mr. Bowman by telephone to request a waiver of the statutory time lines for scheduling the level two hearing. Mr. Bowman verbally agreed to the request, and Mr. Edge completed a standard form used by MCBE confirming the waiver, and sent it to Mr. Bowman for his signature.

6. By letter dated November 26, 2002, Mr. Brooks advised Grievant that the documents she requested either could not be provided because they did not exist, or would not be provided without authorization from the individuals involved. One exception was a “grid” which illustrated certain points assigned to the applicants, from which individual identities would be redacted. 7. On November 27, 2002, the day before Thanksgiving break, Mr. Bowman called the MCBE offices, and in Mr. Edge's absence left a message with secretary Gia Deasy. Ms. Deasy's note states that Mr. Bowman's “direct quote” was that he had “Re[a]d Steve Brooks' reply today in light of all bullshit in letter there will be no extension of time at level 2.”

8. By memorandum dated December 2, 2002, Mr. Edge advised Mr. Bowman that he intended to observe the terms of the agreement made on November 26, 2002, to extend the time lines at level two.

9. Grievant filed a claim for relief by default with MCBE on December 10, 2002.

Discussion

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 hearingexaminer 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 she prevailed by default by a preponderance of the evidence. Donellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002). 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.

This Grievance Board has clarified in its procedural rules the method by which parties may seek default and subsequent relief with the Board at 156 C.S.R. 1.5.1.

5.1. A grievant seeking to prevail by default must file a written claim seeking relief by default with his or her employer and may, at the same time, file the claim with the Board. After the employer receives the written claim for default, it may file a request for a hearing with the Board within five working days. Upon receipt of a claim for relief by default, the Board will place the claim for default on its docket, assign a docket number, and set the claim for hearing. The issues to be decided may include whether a default has occurred at Levels One, Two or Three, whether the employer has a statutory excuse for not responding within the time required by law and/or whether the relief sought is contrary to law or clearly wrong. Once a grievant files a written claim for relief by default with the Board at Level Four, all proceedings at the lower levels are automatically stayed until all default matters have been ruled upon at Level Four, unless all parties agree in writing that lower level proceedings can go forward. Mediation services shall continue to be available while default matters are pending.

Grievant claims she has prevailed by default because MCBE failed to schedule a level two hearing within the statutory time frames. Specifically, with regard to proceedingsat 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.

It is undisputed that a level two hearing was not conducted within five days of the appeal, as required by statute. However, the evidence establishes that the parties agreed to waive the time lines. At level four, Mr. Bowman argued that he was not acting as his daughter's representative, and that Mr. Edge had not secured a waiver from her. That assertion is not credible since Mr. Bowman had appeared with, and acted as Grievant's representative at level one. Further, Mr. Bowman did not advise Mr. Edge that he was no longer acting as Grievant's representative during their telephone conversation on November 26, when he agreed to the waiver. Mr. Bowman does not dispute the wording of the message taken by Ms. Deasy, which establishes that because he was dissatisfied with Mr. Brooks' response to the request for documents, the agreement regarding the waiver was withdrawn.

The time periods in the grievance procedure are not jurisdictional in nature and can be waived by the parties. W. Va. Code § 18-29-3(a). See Plumley v. W. Va. Div. of Natural Resources, Docket No. 00-DNR-091D (June 22, 2000); Skeens v. Lincoln County Bd. of Educ., Docket No. 99-22-171 (Aug. 31, 1999); Jackson v. Hancock County Bd. of Educ., Docket No. 99-15-081D (May 5, 1999). A party cannot acquiesce to, or be the source of, an error during proceedings before a tribunal, and then complain of that error at a laterdate. Rhodes v. Randolph County Bd. of Educ., Docket No. 000-42-233D (Jan. 17, 2001); Jones v. Dep't of Educ., Docket No. 99-DOE-495D (Jan. 3, 2000); Lambert v. W. Va. Dep't of Health & Human Res., Docket No. 99-HHR-326D (Oct. 14, 1999).

In this instance, the failure to conduct a level two hearing within the statutory period was clearly due to the oral agreement between Mr. Edge and Mr. Bowman to waive the time lines, so that Grievant's request for documents could be reviewed. Grievant's attempted unilateral rescission of the waiver lacked any valid basis, and to hold the Board in default in these circumstances would encourage grievants to refuse to cooperate with their employers as a means of obtaining relief without providing evidence to support their claims. Akers v. Higher Education Interim Governing Bd., Docket No. 01-HE-039D (May 3, 2001); See Harmon v. Div. of Corrections, Docket No. 98-CORR-284D (Oct. 6, 1998); Brown v. W. Va. State Bd. of Directors/Bluefield State College, Docket No. 92-BOD-128 (Mar. 30, 1994); Jack v W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14,

1991).

Conclusions of Law

1. In a claim of default, the grievant bears the burden of establishing that he prevailed by default by a preponderance of the evidence. Donellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002).

2. With regard to proceedings at level two under the grievance procedure for education employees, W. Va. Code § 18-29-4(b) requires that a hearing be conducted within five days of receiving the appeal and a written decision be issued within five days of such hearing. 3. The time periods in the grievance procedure are not jurisdictional in nature and can be waived by the parties. W. Va. Code § 18-29-3(a). See Plumley v. W. Va. Div. of Natural Resources, Docket No. 00-DNR-091D (June 22, 2000); Skeens v. Lincoln County Bd. of Educ., Docket No. 99-22-171 (Aug. 31, 1999); Jackson v. Hancock County Bd. of Educ., Docket No. 99-15-081D (May 5, 1999).

4. A party cannot acquiesce to, or be the source of, an error during proceedings before a tribunal, and then complain of that error at a later date. Rhodes v. Randolph County Bd. of Educ., Docket No. 000-42-233D (Jan. 17, 2001); Jones v. Dep't of Educ., Docket No. 99-DOE-495D (Jan. 3, 2000); Lambert v. W. Va. Dep't of Health & Human Res., Docket No. 99-HHR-326D (Oct. 14, 1999).

5 The evidence demonstrates that Grievant's representative's attempt to rescind a waiver after MCBE denied his request for documents contributed to or created the problem.

6. MCBE met its burden of proving Grievant waived her right to a level two hearing within five days.

Accordingly, Grievant's claim for default is **DENIED**, and this case is remanded to the Board for scheduling of a level two evidentiary hearing.

Date: February 26, 2003 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

Grievant expressed some concern that the level two decision was untimely; however, the matter was apparently

dropped after hearing Mr. Edge's testimony that it had been placed in the mail on November 20. Accordingly, no further consideration will be given this matter.