MAGGIE WOOLRIDGE, et al.,
Grievants,

v. **DOCKET NO. 04-33-004D**

McDOWELL COUNTY BOARD
OF EDUCATION,
Respondent.

ORDER DENYING DEFAULT

Grievants Maggie Woolridge, Wanda Collins, Carrie Houk and Kathy Gentry filed a grievance against their employer, McDowell County Board of Education, (Respondent) on September 9, 2003 seeking uniformity of pay. On January 5, 2004, Grievants filed a notice with the Grievance Board alleging the grievance was in default at level two.

A level four hearing to determine whether a default occurred was held in the Grievance Board's Beckley office on March 10, 2004 . Grievants were represented by WVEA UniServ Consultant Ben Barkey, and Respondent was represented by counsel, Kathryn R. Bayless . This matter became mature for decision at the close of the hearing.

Based on a preponderance of the credible evidence adduced at the hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievants filed a grievance on or about September 9, 2003, claiming a violation of W. Va. Code § 18A-4-5a.

2. At the conclusion of the level two hearing, the parties agreed the decision would be due on December 19, 2003.

3. Suzette Cook was the level two grievance evaluator, and completed the decision on Thursday, December 18, 2003. She dated the decision for the next day, and completed the certificate of service in anticipation of being mailed on the 19th. She placed the decision in her secretary's in-box, for mailing the following day.

4. Respondent's offices were closed on the 19th due to snow. Ms. Cook worked on Monday, December 22, but her secretary did not, and she did not think to retrieve the decision from her secretary's desk and mail it out. There was no school the rest of that week due to snow and the Christmas holiday.

5. When her secretary returned to work on Monday, December 29, she mailed the level two decision to the grievants.

6. Grievants filed their notice of default on the following Monday, January 5, 2004.

DISCUSSION

"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). Because Grievants are claiming they prevailed by default under the statute, they bear the burden of establishing such default by a preponderance of the evidence. Friend v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-346D (Nov. 25, 1998).

The parties stipulated that the level two decision was due to be mailed on December 19, 2003, but was not actually mailed until December 29, 2003. Grievants assert

Respondent defaulted because of this untimely issue, but Respondent counters that Grievant's default claim itself was untimely, having been made ten calendar days after the level two decision was issued.

Respondent is correct. "In order to benefit from the "relief by default" provisions in subsection (a), the grieved employee must raise the default issue as soon as the employee becomes aware of such default. Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997)." Malcomb v. Workers' Compensation Comm'n/Office of Judges, Docket No. 03-BEP-266D (Oct. 28, 2003). Grievants should have filed their notice of default as soon as they were aware it had occurred. By waiting until after the level two decision was issued, they have effectively waived their right to do so.

The following Conclusions of Law support this decision:

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. Because Grievants are claiming they prevailed by default under the statute, they bear the burden of establishing such default by a preponderance of the evidence. Friend v. W. Va. Dep't of Health & 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).

3. "In order to benefit from the 'relief by default' provisions in [W. Va. Code § 18-29-3(a)], the grieved employee must raise the default issue as soon as the employee becomes aware of such default. Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997)." Malcomb v. Workers' Compensation Comm'n/Office of Judges, Docket No. 03-BEP-266D (Oct. 28, 2003).

4. Grievants did not raise the default issue in a timely manner and are therefore precluded from receiving relief by default.

For the foregoing reasons, default is hereby **DENIED**.

Since this default was filed, Respondent has waived consideration of the grievance at level three and Grievants have forwarded their appeal to level four. The parties are therefore directed to confer with each other and provide this office with four or five dates that all parties are available for a level four hearing on the merits of the case. Respondent is directed to forward to the Grievance Board the complete record of the grievance, including transcripts and exhibits, by March 31, 2004.

Date: March 15, 2004

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M. Paul Marteney
Administrative Law Judge