THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

CAROLYN SMITH,

Grievant,

v. **Docket No. 06-30-183D**

Denise M. Spatafore

Administrative Law Judge

MONONGALIA COUNTY BOARD OF EDUCATION,

Respondent.

ORDER DENYING DEFAULT

This matter came to level four on May 25, 2006, pursuant to Grievant's claim that a default occurred when the level two decision was not issued in a timely manner. A hearing regarding the default was held in Westover, West Virginia, on October 2, 2006. (See footnote 1) Grievant represented herself, and Respondent was represented by counsel, Harry Rubenstein. The default issue became mature for consideration at the conclusion of the hearing.

The following material facts have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant is employed by Respondent as a cook. She initiated a grievance in January of 2005 alleging harassment by her superiors, and that she had been improperly evaluated and placed on a plan of improvement. 2. When she initiated her grievance, Grievant was represented by John Roush, attorney for the School Service Personnel Association.

3. The grievance proceeded through level one, and a level two hearing was held on October 6 and 11, 2005.

4. The level two hearing was conducted by Jacob Mullett, Assistant Superintendent.

5. Since mid-2005, Mr. Mullett has been battling cancer and has been through various treatments. At times, he has been extremely ill and has missed lengthy periods of work.

6. At the conclusion of the level two hearing, the parties agreed that Mr. Mullett would have until November 15, 2005, to issue a decision, unless his medical problems necessitated another delay.

7. Mr. Mullett wrote a letter to Mr. Roush on November 14, 2005, stating that he would need additional time to prepare the decision, “[d]ue to other previous commitments as well as health problems.” He requested to have a continuance until December 12, 2005.

8. Mr. Roush did not respond to Mr. Mullett's request for an extension, in writing or otherwise. He testified that he did not object to giving Mr. Mullett the additional time requested.

9. Due to his illness, Mr. Mullett did not issue a decision on or before December 12, 2005.

10. Neither Grievant nor Mr. Roush contacted Mr. Mullett or any other Board official when the level two decision was not issued on the agreed date. 11. On May 25, 2006, Grievant filed a notice of default with the Grievance Board.

12. On June 13, 2006, Mr. Mullett transmitted his level two decision to Mr. Roush and to Grievant.

13. Mr. Roush filed a level three appeal on behalf of Grievant on June 20, 2006, and was unaware of Grievant's request for default.

14. Due to a disagreement as to the merits of pursuing the grievance, Mr. Roush withdrew his representation of Grievant on June 20, 2006.

15. During the period between December 12, 2005, and June 13, 2006, Mr. Roush assumed that Mr. Mullett had not issued a decision because of his severe illness.

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 Grievant is claiming she prevailed by default under the statute, she bears 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).

At level two, the grievance evaluator is required to issue a written decision within five days of the hearing. W. Va. Code § 18-29-4(b). Of course, in the instant case, the parties agreed to extend the deadline beyond the statutory deadline, which is permitted. Timelines may be extended by the actions of the grievant and by the agreement of the parties. *Gerencir v. Kanawha County Bd. of Educ.*, Docket No. 01-20-500D (Nov. 30, 2001);*Mullins v. Kanawha County Bd. of Educ.*, Docket No. 01-20-038D (Apr. 10, 2001). It is obvious that Mr. Mullett failed to issue the level two decision within the timeframe agreed upon by the parties. However, it is undisputed that he was seriously ill during this time period and only worked for short periods of time, when he worked at all, and illness is a statutory excuse for default. (See footnote 2) Moreover, Grievant waited more than five months to raise the issue of default, and Mr. Roush, while still representing her, chose not to raise the issue at all, presuming that Mr. Mullett's illness was the cause. 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).

Accordingly, Respondent's default is excused by the hearing evaluator's illness, and Grievant was required to raise the issue of default when she knew it had occurred in December of 2005. The following conclusions of law support the foregoing.

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 grievant bears 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). 3. At level two, the grievance evaluator is required to issue a written decision within five days of the hearing. W. Va. Code § 18-29-4(b).

4. Timelines may be extended by the actions of the grievant and by the agreement of the parties. *Gerencir v. Kanawha County Bd. of Educ.*, Docket No. 01-20- 500D (Nov. 30, 2001); *Mullins v. Kanawha County Bd. of Educ.*, Docket No. 01-20-038D (Apr. 10, 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. The level two hearing evaluator failed to issue the decision within the agreed timeframe due to illness.

7. Grievant failed to raise the default issue as soon as she knew it had occurred.

Accordingly, Grievant's request for relief by default is **DENIED**. This matter shall now proceed to a level four hearing on the merits, and the parties are directed to confer with one another and provide this office with at least four mutually agreeable dates for the hearing by **October 20, 2006**.

Date: October 11 , 2006

_____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

After the matter came to level four, the parties unsuccessfully attempted mediation.

Footnote: 2

At the time this default hearing was held, Mr. Mullett has continued to be quite ill, and could not attend or testify.