WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

DOUG SWICK, et al.,

Grievants,

v.

Docket No. 2008-1351-CONS

SOUTH BRANCH CAREER AND

TECHNICAL CENTER,

Respondent.

ORDER DENYING DEFAULT AND

REMANDING GRIEVANCE TO LEVEL ONE

Doug Swick, Ronald Williams, and the South Branch Career and Technical Center Faculty ("Grievants") filed a written notice of default with the Grievance Board on March 14, 2008, alleging they are entitled to prevail by default in a grievance filed against their employer, Respondent South Branch Career and Technical Center ("Respondent"). A default hearing was scheduled to be held on September 5, 2008, at the Board's Office in Elkins, West Virginia, before Administrative Law Judge Thomas J. Gillooly. The case was reassigned to the undersigned Administrative Law Judge because Mr. Gillooly is no longer an employee of the Grievance Board. A phone conference was held on September 2, 2008, during which the parties agreed to submit the default issue on the record of the grievance. Grievants appear by Jacqueline L. Sikora, Esq. Respondent appears by Kimberly S. Croyle, Esq. This matter became mature for consideration on September 26, 2008, upon receipt of the parties' stipulated facts and written briefs.

Synopsis

Grievants filed a written notice of default at level one of the grievance procedure based on the failure of Respondent to schedule a level one hearing. The parties submittedthis issue on the record based on stipulated facts. These facts indicate that counsel for Grievants filed grievance forms with the Grievance Board on or about February 27, 2008. On that same date, a copy of the grievance was submitted to Kimberly S. Croyle, counsel for Respondent. West Virginia Code requires that an employee file a written grievance with the chief administrator stating the nature of the grievance, the relief requested, and requesting either a conference or hearing. It is undisputed that the grievance was not filed with the Director of the South Branch Career and Technical Center. Pursuant to the statutory grievance procedure, no default occurred, because the chief administrator was not notified as required by proper filing. Default is DENIED.

After thorough review of the record, the undersigned makes the following findings of fact:

Findings of Fact

1. On February 27, 2008, Grievants initiated a grievance protesting a lack of basic supplies by Respondent.

2. Grievants filed this grievance form with the West Virginia Public Employees Grievance Board.

3. Grievants served a copy of the grievance form to Kimberly Croyle, counsel for Respondent.

4. Grievants failed to file the level one grievance form with the Director of the South Branch Career and Technical Center.

5. The grievance form requested a hearing at level one. A level one hearing was not conducted within the statutory time frames. 6. By letter dated March 14, 2008, counsel for Grievants provided written notice of default to counsel for Respondent.

7. The parties agreed to submit the issue of default to the undersigned Administrative Law Judge based upon stipulated facts and written argument of counsel.

Discussion

Grievants who allege a default at a lower level of the grievance process have the burden of proving it by a preponderance of the evidence. *Donnellan v. Harrison County Bd. of Educ.*, Docket No. 02-17-003 (Sept. 20, 2002). A preponderance of the evidence is evidence of greater weight, or evidence which is more convincing than that offered in opposition to it. *Hunt v. W. Va. Bureau of Empl. Programs*, Docket No. 97-BEP-412 (Dec. 31, 1997); *Petry v. Kanawha County Bd. of Educ.*,

Docket No. 96-20-380 (Mar. 18, 1997). W. Va. Code § 6C-2-3(b)(1) (2007) provides:

> The grievant prevails by default if a required response is not made by the employer within the time limits established in this article, unless the employer is prevented from doing so directly as a result of injury, illness or a justified delay not caused by negligence or intent to delay the grievance process.

If default occurs, Grievants are presumed to have prevailed, and are entitled to the relief requested, unless Respondent is able to state a defense to the default or demonstrate the remedy requested is either contrary to law or contrary to proper and available remedies. W. Va. Code § 6C-2-3(b)(2). Of course, if Respondent demonstrates that a default has not occurred because it was prevented from meeting the time lines for one of the reasons listed in W. Va. Code § 6C-2-3(b)(1), *supra*, Grievants will not receive the requested relief. If there is no default or the default is excused, the grievance will beremanded to level one or the undersigned may modify the remedy to be granted to comply with the law or otherwise make Grievant whole. W. Va. Code § 6C-2-3(b)(3).

W. Va. Code § 6C-2-4(a)(1) provides the following guidance on filing at level one:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee <u>may</u> file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing. The employee <u>shall</u> also file a copy of the grievance with the board. State government employees shall further file a copy of the grievance with the Director of the Division of Personnel, who may participate at any level in person or by a designee. (Emphasis added).

It is undisputed in this case that Grievants did not file the written grievance form with their chief administrator (in this case, Director Randy G. Whetstone), but instead copied the form filed with the Grievance Board to counsel for Respondent. It is clear to the undersigned Administrative Law Judge that the word “may” was used in the foregoing instructions to indicate that a grievant has the option of filing at level one, or electing not to pursue the grievance. It was not meant to inform Grievants that it was mandatory to file a copy of the grievance with the Grievance Board, but not their employer, that they are initiating the grievance process at level one. Otherwise, the employer will not necessarily be placed on notice that a grievance has been filed, and the time limit to conduct a conference or hearing has begun to run.

In any event, Grievants are only entitled to prevail by default if they complied with the procedure

contained in the statute. W. Va. Code § 6C-2-4(a)(1) requires that the levelone grievance form be filed with the chief administrator (See footnote 1) stating the nature of the grievance, the relief requested, and requesting either a conference or a hearing. The undersigned is not persuaded by Grievants' argument that a proper filing occurred when a copy of the grievance form was transmitted to Kimberly S. Croyle, counsel for Respondent. Grievants argue that even if the undersigned finds that Grievants should have filed their grievance with the South Branch Career and Technical Center rather than with its counsel, Grievants should still prevail on the default for "substantially complying" with the grievance procedure. *See State ex rel. Catron v. Raleigh County Board of Education*, 496 S.E.2d 444, 201 W. Va. 302 (1997). The West Virginia Supreme Court of Appeals, in applying the old grievance procedure, ruled in *Catron*, *supra*, that a substitute teacher who substantially complied with the statutory requirements for filing a grievance of a school board's decision was entitled to default where the Board of Education failed to respond to the substitute teacher's grievance within mandatory time periods. In a *per curiam* opinion, the Court rejected the Board of Education's argument that Grievant should have sent his grievance form to the principal where he was then working as a substitute teacher, not to the principal of the school where the act being aggrieved occurred. The Court reasoned that if they were to adopt the Board of Education's argument, a grievant who is a substitute teacher and who is assigned to work at various schools for periods of time might never have an"immediate supervisor" long enough at any school to follow through with the grievance procedure.

The instant case can be distinguished from the facts particular to the ruling in *Catron*, *supra.* In filing the instant grievance at level one, Grievants were aware that their chief administrator under the grievance procedure was Director Whetstone. The grievance should have been filed with the chief administrator at level one. While the undersigned does recognize that the West Virginia Office of Education Performance Audits has recommended a State take-over of the facility, and the removal of Mr. Whetstone from his position, the statutory requirement to file with the chief administrator cannot be ignored. Because Respondent had no notice that a hearing needed to be scheduled, it cannot be found in default. Grievants failed to establish that Respondent did not properly hold a level one hearing on their grievance within the time limit specified in W. Va. Code § 6C-2-4(a)(3), as Grievants did not file a written grievance with the chief administrator.

Because no default occurred in this matter, Respondent does not have to show that the remedy

sought is contrary to law or contrary to proper and available remedies. Inasmuch as the level one proceeding has not been conducted, this matter is appropriately **REMANDED** to level one of the grievance procedure for hearing or conference. Accordingly, this grievance is **DISMISSED** from the level three docket and **REMANDED** to the level one docket. Upon receipt of this Order, the parties are directed to follow all required time lines in holding a level one hearing or conference.

In addition to the foregoing discussion, the following conclusions of law are appropriate in this matter:

Conclusions of Law

1. Grievants who allege a default at a lower level of the grievance process have the burden of proving it by a preponderance of the evidence. *Donnellan v. Harrison County Bd.of Educ.*, Docket No. 02-17-003 (Sept. 20, 2002). A preponderance of the evidence is evidence of greater weight, or evidence which is more convincing than that offered in opposition to it. *Hunt v. W. Va. Bureau of Empl. Programs*, Docket No. 97-BEP-412 (Dec. 31, 1997); *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997).

2. W. Va. Code § 6C-2-4(a)(1) provides the following guidance on filing at level one:

> Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing. The employee shall also file a copy of the grievance with the board. State government employees shall further file a copy of the grievance with the Director of the Division of Personnel, who may participate at any level in person or by a designee.

3. Grievants failed to establish that Respondent did not properly hold a level one hearing on their grievance within the time limit specified in W. Va. Code § 6C-2-4(a)(3), as Grievants did not file a written grievance with the chief administrator.

Accordingly, Grievants request for a determination of default under W. Va. Code § 6C-2-3(b)(1) is **DENIED**. This matter is hereby **DISMISSED** form the level three docket and **REMANDED** to level one for hearing or conference as previously indicated in this Order.

Date: December 8, 2008

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Ronald L. Reece

Administrative Law Judge

Footnote: 1

"'Chief administrator' means, in the appropriate context, the commissioner, chancellor, director, president or head of any state department, board, commission, agency, state institution of higher education, commission or council, the state superintendent, the county superintendent, the executive director of a regional educational service agency or the director of a multicounty vocational center who is vested with the authority to resolve a grievance. A 'chief administrator' includes a designee, with the authority delegated by the chief administrator, appointed to handle any aspect of the grievance procedure as established by this article." W. Va. Code § 6C-2-2(b).