THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

MIKE VANMETER,
Grievant,

v. **Docket No. 2013-0728-SBCTC**

SOUTH BRANCH CAREER
AND TECHNICAL CENTER,
Respondent.

ORDER DENYING DEFAULT AND DISMISSING GRIEVANCE

Mike Van Meter, Grievant, filed a written notice of default with the Grievance Board on November 6, 2012, alleging he is entitled to prevail by default in a grievance filed against his employer, South Branch Career and Technical Center, Respondent. A phone conference was conducted by the undersigned Administrative Law Judge on January 15, 2013. Grievant appeared in person and by his counsel, John Everett Roush, West Virginia School Service Personnel Association. Respondent appeared by its counsel, Gregory W. Bailey, Bowles Rice, LLP. This matter became mature for consideration upon receipt of the last of the parties' proposals on February 19, 2013.

Synopsis

Grievant 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 facts indicate that Grievant is not an employee of Respondent, and seeks to challenge his unsuccessful application for employment. It is well settled that a grievant may not use the grievance

procedure to challenge an action that was not taken by his or her employer. Grievant's request for default is denied, and this grievance is dismissed from the docket.

The following findings of fact are based upon the record and the parties' proposals.

Findings of Fact

1. Grievant is employed as a bus operator by the Grant County Board of Education.

2. Respondent is a multi-county vocational school serving the Grant, Pendleton, and Hardy County Boards of Education.

3. The past practice of Respondent has been to employ the most senior bus operator from one of the three participating counties to perform an extracurricular assignment transporting nursing students to various locations as part of their educational experience and training.

4. Grievant applied for the extracurricular assignment transporting nursing students that Respondent posted. There were two such assignments. One of the assignments was filled by a more senior bus operator. Respondent filled the other assignment with a bus operator from Pendleton County with less seniority as a bus operator than Grievant.

5. The bus operator from Pendleton County was employed as a substitute on the extracurricular assignment transporting nursing students when the employee who held a contract for that assignment was unable to perform the job.

Discussion

A grievant who alleges a default at a lower level of the grievance process has 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. *Browning v. Logan County Bd. of Educ.*, Docket No. 2008-0567-LogED (Jan. 27, 2009).

"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." W. VA. CODE § 6C-2-3(b)(1). The issues to be resolved are whether a default has occurred and whether the employer has a statutory excuse for not responding within the time required by law. *Dunlap v. Dep't of Envtl. Protection*, Docket No. 2008-0808-DEP (Mar. 20, 2009).

The term "response," as used in the default provision, not only refers to the obligation to render decisions within the statutory time limits, but to the holding of conferences and hearings within proper limits as well. *Hanlon v. Logan County Bd. of Educ.*, 201 W. Va. 305, 496 S.E.2d 447 (1997). Therefore, Grievant may seek relief for default based upon the failure to hold a hearing within the time period mandated by statute.

Grievant acknowledges that in order to be able to file a grievance, Grievant must establish some sort of employment relationship with Respondent. It is undisputed that Grievant is an employee of the Grant County Board of Education. Grievant argues that

Respondent meets the definition of agent since it provides a service for the Grant County Board of Education, and that multi-county vocational schools are the creatures of the participating boards of education. Grievant goes on to argue that "[w]hether the Respondent is viewed as the agent of the Grant county [sic] Board of Education or simply one of its schools, that Grant County board [sic] happens to share with other counties, the contractual privity between Grievant as an employee of Grant County Board of Education, and the Respondent is obvious." Grievant's proposals, page 6. Counsel for Grievant did not provide any authority in support of his theory of privity of contract.

Respondent counters that the basis for Grievant's claim that he is an employee of South Branch Career and Technical Center is frivolous and devoid of any factual or legal underpinnings. Respondent asserts that Grievant's attempt to invoke the grievance procedure in making a claim against the Respondent has been made in bad faith. Respondent moves the undersigned to dismiss this grievance.[1] Counsel for Respondent also makes the request that they be awarded costs in this proceeding.

West Virginia Code § 6C-2-2(g) defines "employer" for the purposes of the grievance procedure, as follows:

> [A] state agency, department, board, commission, college, university, institution, State Board of Education, Department of Education, county board of education, regional educational service agency or multicounty vocational center, or agent thereof, **using the services of an employee** as defined in this section. (Emphasis added.)

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[1]When the employer asserts an affirmative defense, it must be established by a preponderance of the evidence. *See Lewis v. Kanawha County Bd. of Educ.*, Docket No. 97-20-554 (May 27, 1998); *Lowry v. W. Va. Dep't of Educ.*, Docket No. 96-DOE-130 (Dec. 26, 1996); *Hale v. Mingo County Bd. of Educ.*, Docket No. 95-29-315 (Jan. 25, 1996). *See generally Payne v. Mason County Bd. of Educ.*, Docket No. 96-26-047 (Nov. 27, 1996); *Trickett v. Preston County Bd. of Educ.*, Docket No. 95-39-413 (May 8, 1996).

In turn, the same statute, in subsection (e)(1), defines "[e]mployee" as "any person hired for permanent employment by an employer for a probationary, full- or part-time position." A "Grievance" is "a claim by an employee." W. VA. CODE § 6C-2-2(i). Only an employee may file a grievance. W. VA. CODE § 6C-2-2(a)(1).

The Grievance Board has held that the grievance board statute "provides that the purpose of the statutory grievance procedure is to allow education employees and their employer to reach solutions to problems which arise within the scope of their respective employment relationships." *Farley v. Morgan County Bd. of Educ.*, Docket No. 01-32-615D (April 30, 2002).

In the instant case, Grievant is challenging his non-selection for the extracurricular bus run that was posted by Respondent. This grievance challenges a decision which was not made by his employer. The designation of the Grant County Board of Education for the South Branch Career and Technical Center as its fiscal agent has no relationship to the personnel decisions of Respondent. West Virginia Department of Education Policy 3232 provides that, as a fiscal agent, a county board of education has no role in the decisions of a multi-county vocational center.[2] The undersigned finds that, under the circumstances presented, Grievant is not entitled to relief by default. Grievant does not fall under the definition of "employee" contained in WEST VIRGINIA CODE §§ 6C-2-1 *et seq*, therefore, he has no standing to pursue his claim through the grievance procedure. The

[2]"The Fiscal Agent cannot initiate action, control, or direct the Center. The Fiscal Agent's approval authority is limited to the question of the action's legality, the Administrative Council having sole discretionary authority."

undersigned orders this case dismissed from the docket. Respondent's request for a finding of bad faith and an award of costs is denied.

The following conclusions of law are appropriate in this matter.

Conclusions of Law

1. A grievant who alleges a default at a lower level of the grievance process has 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. *Browning v. Logan County Bd. of Educ.*, Docket No. 2008-0567-LogED (Jan. 27, 2009).

2. "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." W. VA. CODE § 6C-2-3(b)(1). The issues to be resolved are whether a default has occurred and whether the employer has a statutory excuse for not responding within the time required by law. *Dunlap v. Dep't of Envtl. Protection*, Docket No. 2008-0808-DEP (Mar. 20, 2009).

3. Grievant does not fall under the definition of "employee" contained in WEST VIRGINIA CODE §§ 6C-2-1 *et seq*, therefore, he has no standing to pursue his claim through the grievance procedure.

Accordingly, the request for default is **DENIED**. The case is **ORDERED** dismissed from the Grievance Board docket.

Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. VA. CODE § 6C-2-5. Neither the West Virginia Public 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 Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

Date: March 22, 2013

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Ronald L. Reece
Administrative Law Judge