CAROLYN PARKER,

Grievant,

v. **Docket No. 99-HHR-296D**

WEST VIRGINIA DEPARTMENT OF HEALTH

AND HUMAN RESOURCES,

Respondent.

ORDER DENYING DEFAULT

Grievant, Carolyn Parker, filed a motion for default judgment, with her employer, West Virginia Department of Health and Human Resources ("HHR"), in the above-styled grievance on April 2, 1999, in accordance with W. Va. Code § 29-6A-3(a)(2). A hearing on this matter was held in the Grievance Board's Charleston, West Virginia, office on October 7, 1999, and this default claim became mature for decision on November 2, 1999, after receipt of the parties' proposed findings of fact and conclusions of law. Grievant was represented by her husband, Robert Parker, and HHR was represented by Tiffany Bost, Assistant Attorney General, at hearing, and B. Allen Campbell, Assistant Attorney General, submitted proposed Findings of Fact and Conclusions of Law.

After a detailed review of the record in its entirety the undersigned Administrative Law Judge makes the following Findings of Fact pertinent to this matter.

Findings of Fact

1. The initial grievance was filed on or about March 20, 1998.
2. This grievance was denied at Levels I and II.
3. The Level III hearing was begun on August 4, 1998, and as the grievancewas not completed, a second day of hearing was scheduled on September 18, 1998.
4. On that date, Grievant asked to amend her original grievance to add a second suspension she had recently received. In essence, she requested this second grievance by-pass the lower levels

and start at Level III.

5. This request was granted, and additional days of hearing on the two grievances were held on August 24, 1998, September 18, 1998, and April 15, 1999. (See footnote 1)

6. At the close of the April 15, 1999 hearing, Grievance Evaluator Paul Marteney made the following statement:

> Okay. we're back on the record. ** marked Grievant's Exhibit 16, ** which marked as sixteen point one and sixteen point two. Also we've established that the parties will submit proposed findings of fact and conclusions of law. The Respondent[']s will be due by May seventh. The Grievant's (sic) can respond, it will be due May twenty-eighth. My decision will be done five working days after May twenty-eighth. (See footnote 2)

7. Directly after Grievance Evaluator Marteney made this statement, the following exchange took place between the Grievance Evaluator and Grievant's representative:

> PARKER R Mister Hearing Examiner, if it would be, if you would like I
>
> we would waive the five day period that you have to get the decision to make sure that . . .
>
> MARTENEY . . . I would appreciate that.
>
> PARKER R I would be willing to waive the five day period.
>
> MARTENEY I'll get it done as soon as I can.
>
> PARKER R I mean really, I mean , I know sometimes . . .
>
> MARTENEY . . .okay . . .
>
> PARKER R . . . I would be willing to waive the **.
>
> MARTENEY Thank you. It'd probably be easier just to put it in the findings of fact

and **. Alright. Thanks.

8. Respondent requested and was granted an extension to file its proposals. Grievance Evaluator Marteney did not ask Grievant if this extension was all right with her, but informed her she would have additional time to file her proposals.

9. Grievant called Grievance Evaluator Marteney numerous times from May 13 to May 19, 1999, requesting a copy of Respondent's proposals.

10. Respondent turned in its proposals to Grievance Evaluator Marteney on May 20, 1999, and Grievant's supervisor, Francis Jackson, left a copy of these proposals in Grievant's chair at work, as Grievant does not have a mail box.

11. Grievant called Grievance Evaluator Marteney again on June 1, 1999, asking for a copy of Respondent's proposals. (See footnote 3) Grievance Evaluator Marteney sent these to Grievant, and Grievant had until June 23, 1999, to file her response.

12. Grievant's proposals were sent by messenger to Grievance Evaluator Marteney on June 23, 1999, and his fourteen page, Level III Decision was issued on July 14, 1999. This was fourteen days after the receipt of the proposals. (See footnote 4) 13. In this decision, Grievance Evaluator Marteney notes on page 4, Grievant waived the time frame for rendering a decision due to the complexity of the issues.

14. Grievance Evaluator Marteney also noted, at footnote 1, that Respondent did not file its proposals at the agreed upon time. Grievance Evaluator Marteney observed that as Grievant "had already waived the procedural time frames, this was not considered to prejudice her rights in any way."

15. On July 21, 1999, Grievant appealed the Level III decision to Level IV. Grievant alleged Respondent was in default for failure to render a Level III decision in five working days. (See footnote 5)

Issues and Arguments

Grievant made multiple arguments as to why Respondent has defaulted. Key among these arguments was the offer to extend the timelines. (See footnote 6) Grievant acknowledges she offered to waive the procedural timelines, but argues Grievance Evaluator Marteneynever accepted this

offered as demonstrated by the conversation quoted in Finding of Fact Number 7. Thus, Respondent has defaulted in this grievance. Grievant also argues there could be no granting of a waiver as Respondent did not agree to this waiver or extension of the timelines. (See footnote 7)

Respondent argues Grievant offered to extend the timelines, and Grievance Evaluator Marteney accepted this proposal. In the alternative, Respondent argues, if indeed Grievant did not intend to waive the extension, Grievance Evaluator Marteney was induced by Grievant's statements into believing there was such a waiver, and thus his failure to issue the decision in a timely manner was due to excusable neglect. (See footnote 8)

Discussion

The issue of default in a grievance filed by a state employee came within the jurisdiction of the Grievance Board last year. On March 13, 1998, the West Virginia Legislature passed House Bill 4314, which, among other things, added a default provision to the state employees grievance procedure, effective July 1, 1998. (See footnote 9) That Bill amended W. Va. Code § 29-6A-3(a), adding the following paragraph relevant to this matter:

> (2) 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. The grievant prevails by default 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, injury, excusable neglect, unavoidable cause or fraud. Within five days of the receipt of a written notice of the default, the employer may request a hearing before a level four hearing examiner for the purpose of showing that the remedy received by the prevailing grievant is contrary to law or clearly wrong. In making a determination regarding the remedy, the hearing examiner shall presume the employee prevailed on the merits of the grievance and shall determine whether the remedy is contrary to law or clearly wrong in light of the presumption. If the examiner finds that the remedy is contrary to law, or clearly wrong, the examiner may modify the remedy to be granted to comply with the law and to make the grievant whole.

In addition, House Bill 4314 added the following language to W. Va. Code § 29-6A- 5(a): "[t]he [grievance] board has jurisdiction regarding procedural matters at levels two and three of the grievance procedure."

This Grievance Board has previously adjudicated related issues arising under the default provision in the grievance statute covering education employees, W. Va. Code § 18-29-3(a). See, e.g., Ehle v. Bd. of Directors, Docket No. 97-BOD-483 (May 14, 1998); Gruen v. Bd. of Directors,

Docket No. 94-BOD-256 (Nov. 30, 1994); Wadbrook v. W. Va. Bd. of Directors, Docket No. 93-BOD-214 (Aug. 31, 1993); Flowers v. W. Va. Bd. of Trustees, Docket No. 92-BOT-340 (Feb. 26, 1993). 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). A preponderance of the evidence is generally recognized as evidence of greater weight, or which is more convincing thanthe 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).

W. Va. Code § 29-6A-4(c) provides the following directions regarding when Respondent must act at Level III:

> Within five days of receiving the decision of the administrator of the grievant's work location, facility, area office, or other appropriate subdivision of the department, board, commission or agency, the grievant may file a written appeal of the decision with the chief administrator of the grievant's employing department, board, commission or agency. A copy of the appeal and the level two decision shall be served upon the director of the division of personnel by the grievant.
>
> The chief administrator of his or her designee shall hold a hearing in accordance with section six of this article within seven days of receiving the appeal. The director of the division of personnel or his or her designee may appear at the hearing and submit oral or written evidence upon the matters in the hearing.
>
> The chief administrator or his or her designee shall issue a written decision affirming, modifying or reversing the level two decision within five days of the hearing. (emphasis added).

This Grievance Board has been directed in the past that "the grievance process is intended to be a fair, expeditious, and simple procedure, and not a 'procedural quagmire.'" Harmon v. Fayette County Bd. of Educ., Docket No. 98-10-111 (July 9, 1998), citing Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 393 S.E.2d 739 (1990), and Duruttya v. Bd. of Educ., 181 W. Va. 203, 382 S.E.2d 40 (1989). See Watts v. Lincoln County Bd. of Educ., Docket No. 98-22-375 (Jan. 22, 1999). As stated in Duruttya, supra, "the grievance process is for "resolving problems at the lowest possible

administrative level." Additionally, Spahr, supra, indicates the merits of the case are not to be forgotten. Id. at743. See Edwards v. Mingo County Bd. of Educ., Docket No. 95-29-472 (Mar. 19, 1996). Further, Duruttya, supra, noted that in the absence of bad faith, substantial compliance is deemed acceptable.

The specified time limits in the grievance statute may be extended for a "reasonable time" by mutual, written agreement of the parties. See W. Va. Code §29-6a-3(g). Waiver of the strict statutory timelines is a common occurrence within the context of the grievance procedure. This practice benefits both parties by allowing employers sufficient time to give grievances careful attention and care, rather than “rushing” to judgment. Jackson v. Hancock County Bd. of Educ., Docket No. 99-15-081D (May 5, 1999). Grievant's testimony at the Level IV hearing is difficult to understand. While she admits the discussion set forth above did occur as stated, and that she indeed did offer to waive the timelines, she now claims Grievance Evaluator Marteney did not accept her offer, and thus, there was no waiver. It must be noted that Grievance Evaluator Marteney did not ask for the timelines to be waived, but this offer was made by Grievant's representative several times.

Grievance Evaluator Marteney's acceptance of this offer is clear in his verbal responses. The following responses reflect this acceptance: 1) "I would appreciate that"; 2) "I'll get it done as soon as I can"; 3) "okay"; and 4) "Thank you." . . . "Alright. Thanks." This agreement was understandable given the length of the transcript, number of hearings and the fact that another Grievance Evaluator heard the first day of hearing. See Bowyer v. Bd. of Trustees/ W. Va. Univ., Docket No. 99-BOT-197D (July 13, 1999).

Although the agreement to extend the timelines was not written, it is on the record,and Grievant's representative clearly offered and agreed to the extension during a formal, recorded hearing. This agreement is sufficient to constitute a valid waiver of the time to issue a decision under the statute, and it is sufficient for substantial compliance. Duruttya, supra; Bowyer, supra; Jackson, supra.

Further, it is noted that the time periods in the grievance procedure are not jurisdictional in nature and are subject to equitable principles of tolling, waiver, and estoppel. Jackson, supra; Gaskins v. W. Va. Dep't of Health, Docket No. 90-H-032 (Apr. 12, 1990). This Grievance Board has frequently applied such principles, specifically estoppel, to toll the time for filing a grievance. See, e.g., Lilly v. Raleigh County Bd. of Educ., Docket No. 94-41-195 (Nov. 28, 1994). Such principles have similarly been applied in evaluating default cases. Harmon v. Div. of Corrections, Docket No. 98-CORR-284D

(Oct. 6, 1998). In order to prevail in a claim of estoppel, a party must show that there was a representation made or information given by the opposing party which was relied upon, causing an alteration of conduct or change of position to the first party's detriment. Ara v. Erie Insurance Co., 182 W. Va. 266, 387 S.E.2d 320 (1989).

Unquestionably, Grievance Evaluator Marteney relied upon Grievant's representation that the timelines for issuing the Level III Decision were waived. In relying upon Grievant's agreement in this regard, HHR delayed issuing the decision beyond the statutory time limitation of five days after the hearing. Therefore, the doctrine of estoppel would bar Grievant from now claiming that a default occurred.

Accordingly, the undersigned concludes Grievant has failed to meet her burden of proof in this default claim. Her admitted offer and agreement to allow an extension of thestatutory time line at Level III prohibits any claim that a default occurred at that level.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. "The grievant prevails by default 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, injury, excusable neglect, unavoidable cause or fraud." W. Va. Code §29-6A-3(a).

2. When a grievant asserts her employer is in default in accordance with W. Va. Code § 29-6A-3(a)(2), the grievant bears the burden of establishing her claim for default by a preponderance of the evidence. Cody v. Div. of Juvenile Serv., Docket No. 99-DJS- 190D (Aug. 3, 1999); Friend v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-346D (Nov. 25, 1998).

3. The specified time limits in the grievance statute may be extended for a "reasonable time" by mutual agreement of the parties. See W. Va. Code § 29-6a-3(g).

4. The agreement reached on the record by the parties at the Level III hearing, constitutes substantial compliance with this statute. Duruttya v. Bd. of Educ., 181 W. Va. 203, 382 S.E.2d 40 (1989); Bowyer v. Bd. of Trustees/ W. Va. Univ., Docket No. 99-BOT- 197D (July 13, 1999); Jackson v. Hancock County Bd. of Educ., Docket No. 99-15-081D (May 5, 1999); .

5. A party simply 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. Lambert v. W. Va. Dep't of Health and Human Resources, Docket No. 99-HHR-326D (Oct. 14, 1999). See, e.g., State v. Crabtree, 198 W. Va. 620, 627, 482 S.E.2d 605, 612 (1996) ("Having induced an error, a party in a normal case may not at a later stage of the trial use the error to set aside its immediate and adverse consequences."); Smith v. Bechtold, 190 W. Va. 315, 319, 438 S.E.2d 347, 351 (1993) ("[I]t is not appropriate for an appellate body to grant relief to a party who invites error in a lower tribunal.") (Citations omitted).

6. Because Grievant offered at the end of the Level III hearing to extend the timelines for issuance of the Decision, and Grievance Evaluator Marteney accepted this offer, she has waived entitlement to the default provisions of W. Va. Code § 29-6A-3(a). Lambert, supra.

Accordingly, Grievant's Motion for Default is **DENIED**. This matter will remain on the docket for further adjudication at Level IV. The representatives of the parties are requested to confer and provide mutually agreed upon dates to conduct the Level IV hearing on the merits of this grievance.

_____ **JANIS I. REYNOLDS**

Administrative Law Judge

Dated: November 30, 1999.

Footnote: 1

The first day of Level III hearing was conducted by a different Grievance Evaluator. The August 24, 1998 hearing was a telephonic conference.

Footnote: 2

*Inaudibles are noted in the Level III Transcript by using the mark **.*

Footnote: 3

Grievant could not recall why she did not call Grievance Evaluator Marteney during the end of May. She stated she may have been busy with reports.

Footnote: 4

This Decision was signed off on by Deputy Secretary David Fornash on July 9, 1999, but not mailed until July 14, 1999. No information about these dates was given at the Level IV default hearing.

Footnote: 5

Grievant also alleged that Respondent was in default for failure to submit its proposals in a timely manner. This allegation was abandoned at Level IV.

Footnote: 6

Grievant made several arguments in her post-hearing submissions. As these arguments were not raised at hearing, and Respondent was not given an opportunity to respond to these issues, they cannot be considered. These arguments centered on Grievant's contention that Grievance Evaluator Marteney directed her to file her agreement to waive the time frames in her proposals, and since she did not, Grievance Evaluator Marteney was in error when he believed there was a waiver.

The conversation in Finding of Fact Number 7 does not direct the representative to put the waiver in his proposals. Due to the Inaudibles, it is only clear Grievance Evaluator Marteney discussed putting the waiver in the Findings of Fact, but it also appears he is referring to his Findings of Fact, as he does not called them proposed.

Grievant also argued in her post-hearing proposals that she alleged default in her June 23, 1999 proposals. There is no evidence or testimony in the record to support this contention. The issue was not raised during the Level IV hearing, and lower level proposals are not considered part of the record and are not submitted to Level IV.

Footnote: 7

This argument is considered to be without merit as the only party who can raise this as an issue is Respondent, and Respondent has not argued this issue.

Footnote: 8

Since the undersigned Administrative Law Judge finds Grievant agreed to waive the timelines, this argument need not be discussed further.

Footnote: 9

This provision is applicable only to grievances filed on or after July 1, 1998. Jenkins-Martin v. Bureau of Employment Programs, Docket No. 98-BEP-285 (Sept. 24, 1998). In this case, the initial grievance was filed before July 1, 1998, and the second grievance was filed after that date. Since the issue was not raised by the parties, and since the Level III Decision at issue speaks to both grievances, the provision will be applied.