DAVID TIGNOR, et al.,

Grievants,

v. **Docket No. 99-DOE-468D**

DEPARTMENT OF EDUCATION,

Respondent.

ORDER DENYING DEFAULT

On November 3, 1999, Respondent, Department of Education ("DOE"), filed at Level IV, a "Request for Hearing to Determine Whether There Has Been Default," stating that a letter had been received from Grievants' representative on November 1, 1999, alleging DOE had failed to issue level one decisions for Grievants in a timely manner, and the Grievants were entitled to prevail by default. The Grievants are David Tignor and Linda Blair, and they were represented by Perry Bryant. (See footnote 1) DOE was represented by Kitty Dooley, Esquire. A Level IV hearing was held on Respondent's request on December 15, 1999. The parties elected not to file written argument, and this matter became mature for decision at the conclusion of the hearing.

W. Va. Code § 18-29-1 provides that DOE's employees may utilize theeducation employees grievance procedure. The default provision for education employees is found in W. Va. Code § 18-29-3(a), which provides:

> A grievance must be filed within the times specified in section four of this article and shall be processed as rapidly as possible. The number of days indicated at each level specified in section four of this article shall be considered as the maximum number of days allowed and, if a decision is not rendered at any level within the prescribed time limits, the grievant may appeal to the next level: Provided, That the specified time limits may be extended by mutual written agreement and shall be extended whenever a grievant is not working because of such circumstances as provided for in section ten, article four, chapter eighteen-a of this code. Any assertion by the employer that the filing of the grievance at level one was untimely must be asserted by the employer on behalf of the employer at or before the level two hearing. 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. Within five days of such 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 that presumption. If the examiner finds that the remedy is contrary to law, or clearly wrong, the examiner may modify the remedy to be granted so as to comply with the law and to make the grievant whole.

Effective July 1, 1998, W. Va. Code § 18-29-5 was amended to provide that the Grievance Board "shall administer the grievance procedure at levels two, three and four, . . . as provided for in section four of this article . . .." Based upon this provision, the Grievance Board now has jurisdiction to hear an education employee's default claim, when the default occurs at levels two or three. Jackson v. Hancock County Bd. of Educ., Docket No. 99-15-081D (May 5, 1999). However, the defaulthere is alleged to have occurred at level one. Nonetheless, "should the employer appeal the employee's default declaration on the narrow grounds that the remedy received is contrary to law or clearly wrong, this Grievance Board has jurisdiction to decide such an appeal. 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)." Ehle v. Bd. of Directors, Docket No. 97-BOD-483 (May 14, 1998). This includes a contention by the employer that "any remedy would be clearly wrong because, in fact, no default occurred at the lower levels of the grievance procedure." Id.

Grievants' claim of default is based upon an assertion that their supervisor failed to timely respond to their grievances at Level I. W. Va. Code § 18-29-4(a) provides as follows regarding the grievance procedure at Level I:

> (a) Level one.
>
> (1) Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.
>
> The conference with the immediate supervisor concerning the grievance shall be conducted within ten days of the request therefor, and any discussion shall be by the grievant in the grievant's own behalf or by both the grievant and the designated representative.

(2) The immediate supervisor shall respond to the grievance within ten days of the conference.

(3) Within ten days of receipt of the response from the immediate supervisor following the informal conference, a written grievance may be filed with said supervisor, or in the case where the grievance involves an event under the jurisdiction of a state institution of higher education, the grievance shall be filed with said supervisor and the office of personnel, by the grievant or the designated representative on a form furnished by the employer or agent.

(4) The immediate supervisor shall state the decision to such filed grievance within ten days after the grievance is filed.

Respondent argued Grievants failed to comply with the procedural requirements of the grievance procedure, in that, they did not schedule a conference with their supervisor prior to filing their grievance at Level I, and therefore, no default occurred. (See footnote 2) While Respondent did not specifically articulate that the remedy would be clearly wrong because no default occurred, the result is the same, and it is appropriate that this matter be reviewed at Level IV.

The burden of proof is upon the respondent claiming no default has occurred, or asserting an affirmative defense, to prove the same by a preponderance of the evidence, due to the presumption set forth in W. Va. Code § 18-29-3(a) that the grievant has prevailed on the merits. Ehle, supra. "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that acontested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR-486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

The following findings of fact are derived from the record developed at the Level IV hearing.

Findings of Fact

1. During 1999 employees of the Department of Education were reclassified. At a staff meeting held on July 22, 1999, certain issues regarding salaries after the reclassification were addressed. Grievant Tignor asked why his classification had been changed. Mike McKown, Executive Director, Office of Internal Operations, and David Stewart, Assistant Superintendent, responded by telling him that was a personnel issue, and he would need to take it up with Tony Smedley, Director of Human Resources.

2. Grievants were not satisfied with the titles their positions had been assigned in the

reclassification. About the first week of August 1999, they contacted Mr. Smedley and met with him. Mr. Smedley told Grievants he would have to talk to Mr. Stewart and Mr. McKown, and someone at the Kanawha County Board of Education regarding the classification of employees performing similar duties there, and would get back with them.

3. Sometime in September 1999, Mr. Smedley met individually with Grievants and told them they were properly classified. Mr. Smedley told Grievant Blair that if she wanted to pursue this issue, the grievance procedure was available,and she needed to take it up with her immediate supervisor. Grievants told Mr. Smedley they would file a grievance.

4. Grievants' supervisor is Phillip Uy, Coordinator of the Fiscal Office.

5. Grievants believed their meetings with Mr. Smedley constituted the conference with their supervisor preceding the filing of the grievances under the grievance procedure ("the informal conference"), as Mr. McKown and Mr. Stewart had directed Grievant Tignor to Mr. Smedley to answer his question on July 22.

6. On or about October 5, 1999, Grievants completed grievance forms, grieving their classifications, and placed them on Mr. Uy's desk, beside his computer. They did not tell Mr. Uy they had met with Mr. Smedley and considered those meetings to constitute their informal conferences. Grievant Blair spoke to Mr. Uy when she left her grievance form, telling him she was sick and was going home. Grievant Tignor did not speak to Mr. Uy when he left his form, as Mr. Uy was out of the office, but spoke to him briefly about the grievance later when Mr. Uy asked him if he had heard anything about the grievance. Grievant Tignor simply responded that he had not heard anything, and gave Mr. Uy his representative's telephone number when he asked him for it.

7. Mr. Uy did not attend the July 22, 1999 meeting where Grievant Tignor was directed to see Mr. Smedley.

8. Mr. Uy reviewed the grievance forms and read the instructions on the back. Although he had only been employed by DOE since June 28, 1999, he had some familiarity with the grievance procedure, because he had recently received acompleted grievance form from another employee who also was represented by Mr. Bryant and was unhappy with her classification, and had met with her as the informal conference after receiving the grievance form. He had not received any training in the grievance procedure. He believed Grievants would be contacting him to set up their informal conferences. He did not respond to the grievance forms. He told Mr. McKown about the grievances,

but he did not talk to Mr. Smedley about them and did not know Mr. Smedley had met with Grievants about this matter.

9. Neither Grievants nor their representative scheduled an informal conference with Mr. Uy.

10. On November 1, 1999, Grievants filed a default claim with DOE.

Discussion

Although Grievants thought they had already been through the informal conference stage of the grievance procedure, and they may well have been, they did not make this known to their supervisor. Grievant Blair spoke to her supervisor when she laid the grievance form on his desk, and Grievant Tignor spoke to him briefly about his grievance later. It would have been a simple matter to communicate to him that they had already spoken to Mr. Smedley, and believed this constituted their informal conference, so that Mr. Uy would be aware he was to skip the informal conference stage and simply respond at Level I. A simple note on the grievance forms advising Mr. Uy of this would have sufficed. While there is no indication that Grievants acted in bad faith by intentionally withholding information from Mr. Uy with the intent of tricking him into a default, Grievants did withhold key information whichaffected Mr. Uy's decision as to what he was supposed to do with this grievance. Obviously, invoking the grievance procedure is a legal process which imposes significant obligations and responsibilities on all parties.

By the same token, Mr. Uy cannot simply let a grievance languish on his desk waiting to be contacted by grievants. At the very least, he has an obligation to make sure everyone is clear on the procedures, particularly since the grievance procedure does not appear to contemplate that the grievance be placed in writing at the informal conference stage.

In this case, however, Mr. Uy did speak briefly to Grievant Tignor at some point about the grievance. Mr. Uy asked Grievant Tignor if he had heard anything about his grievance. Grievant Tignor simply told him no, he had not heard anything. Mr. Uy then asked for Mr. Bryant's telephone number. Grievant Tignor stated he thought Mr. Uy was referring to hearing from Mr. Smedley, as he thought Mr. Uy and Mr. Smedley would work together on the grievance; although he had not informed Mr. Smedley he had, in fact, filed a grievance, and had not informed Mr. Uy of his previous meeting with Mr. Smedley. This would have been the perfect opportunity for Grievant Tignor to make sure he and Mr. Uy were on the same page, as it is obvious they were not.

There is no indication Grievants were ever told that their conferences with Mr. Smedley constituted their informal conferences under the grievance procedure. Neither Mr. Stewart nor Mr. McKown indicated they were referring to the grievance procedure when they responded to Grievant Tignor's question by referring him to Mr.Smedley. In fact, Grievant Blair testified she was simply trying to resolve the matter with Mr. Smedley, and it was only after he could not help her with her title that the subject of filing a grievance arose. She testified Mr. Smedley told her if she still did not agree with her classification, there's always the grievance procedure, and she would need to take it up with her immediate supervisor. She stated she told Mr. Smedley she would file a grievance. When asked by Respondent's counsel whether he requested an informal conference with Mr. Uy, Grievant Tignor responded, "[h]e was in and out all the time." Both Grievants acknowledged that Mr. Uy was very busy during this period, and was out of the office much of the time.

Mr. Uy was quite correct that the grievance procedure requires a conference with the immediate supervisor prior to filing the grievance, which is to be initiated by the grievant, not by him. While this Grievance Board has found that someone other than a supervisor may have authority to respond at Level I (Ehle, supra), Mr. Uy had no knowledge of the meeting with Mr. Smedley in evaluating the grievance he received. Mr. Uy did not know Grievants believed he would know that the submission of a grievance form meant they had already had an informal conference with someone else; nor did he understand that it was possible that the informal conference could occur with someone other than himself. Mr. Uy did not simply ignore the grievance procedure. He believed he was at the informal conference stage, and, applying the provisions of the grievance procedure, he was correct.

The Supreme Court of Appeals, however, has repeatedly made it clear that the grievance procedure is not to be technically applied to grievants, who generally arenot lawyers, and often do not have the benefit of legal advice. Hale v. Mingo County Bd. of Educ., 199 W. Va. 387, 484 S.E.2d 640 (1997); Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 391 S.E.2d 739 (1990); Duruttya v. Bd. of Educ., 181 W. Va. 203, 382 S.E.2d 40 (1989). This Grievance Board has likewise refused to apply the grievance procedure so technically to respondents as to elevate form over substance. Ehle, supra.

Further, as pointed out by Grievants, the Supreme Court of Appeals has applied the substantial compliance principles to find that a grievant had complied with the grievance procedures, and a default had occurred, where a principal of a school to which the grievant was not assigned, failed to

respond at Level I when the grievant filed a grievance with him, even though the informal conference had been held with the Director of Personnel, whom the grievant viewed as his supervisor. The grievant was a substitute teacher on preferred recall, and grieved when he was not selected for a position. The grievant had apparently waited two years to claim a default because no action was taken on his grievance. That case, State ex rel. Catron v. Raleigh County Board of Education, 201 W. Va. 302, 496 S.E.2d 444 (1997), was a per curiam opinion, however, and footnote one of that opinion states it is not to be considered legal precedent, and that everything "beyond the syllabus point is merely obiter dicta." The relevant syllabus point quotes Syllabus Point 2 of Duruttya, supra, stating:

> In the absence of any evidence of bad faith, a grievant who demonstrates substantial compliance with the filing provisions contained in W. Va. Code §§ 18A-2-8 and 18-29-1, et seq. (1988) is entitled tothe requested hearing.

Applying this reasoning to Grievants in this instance would result in a default, even though Grievants were the only individuals with all the information necessary for Mr. Uy to make an informed decision; Grievants had the opportunity to provide Mr. Uy with this information; and Grievants failed to tell Mr. Uy they had already met with Mr. Smedley, and failed to tell Mr. Smedley they had filed a grievance with Mr. Uy.

However,

> [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. 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)("It is not appropriate for an appellate body to grant relief to a party who invites error in a lower tribunal." (Citation omitted).)."

Hanlon v. County Bd. of Educ., 201 W. Va. 305, 316, 496 S.E.2d 447, ___ (1997). This principle seems particularly applicable here. Perhaps the key distinction, however, is that Mr. Uy was acting in good faith, and thought he was complying with the statutory requirements. W. Va. Code § 18-29-1 states:

> The purpose of this article is to provide a procedure for employees of the governing boards of higher education, state board of education, county boards of education, regional educational service agencies and multi-county vocational centers and their employer or agents of the employer to reach solutions to problems which arise between them within the scope of their respective employment relationships to the end that good morale may be maintained, effective job performance may be enhanced and the citizens of the community may be better served. This procedure is intended to provide a simple, expeditious and fair processfor resolving problems at the lowest

> possible administrative level and shall be construed to effectuate this purpose. (Emphasis added.)

Under the facts of this case, it would have been simple and expeditious for Grievants to talk to their supervisor so that he was aware of what actions they had already taken and how they wished to proceed. It would not be fair in this instance to find a default, where Grievants' failure to follow the proper procedure, accompanied by their silence with regard to their actions, created the problem.

In addition, it is appropriate to make the following conclusions of law.

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. Before filing a grievance "the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought." W. Va. Code § 18- 29-4(a).

3. The burden of proof is on a respondent appealing a claim of default to Level IV to prove by a preponderance of the evidence that no default occurred, or that it has a statutory excuse for noncompliance with the statutory timelines, due to the presumption set forth in W. Va. Code § 18-29-3(a) that the grievant has prevailed on the merits. Ehle v. Bd. of Directors, Docket No. 97-BOD-483 (May 14, 1998). 4. Respondent proved no default occurred.

Accordingly, the default claim is **DENIED**. This matter should be, and the same hereby is, **ORDERED REMANDED TO LEVEL I** of the grievance procedure for education employees for proper adjudication. No conference with the supervisor is necessary, and Grievants' supervisor is directed to state the decision to such filed grievance within ten days of receipt of this Order. This matter is **ORDERED DISMISSED** and **STRICKEN** from the docket of this Grievance Board.

BRENDA L. GOULD

Administrative Law Judge

Dated: December 30, 1999

Footnote: 1

Respondent's request also included a default claim filed by Claudia Jones. As the basis for that default claim was different from the claims of these Grievants, Ms. Jones' default claim was separated from this matter by agreement of the parties.

Footnote: 2

Respondent asserted, in the alternative, the affirmative defense of excusable neglect. While the state employees grievance procedure found in W. Va. Code §§ 29-6A-1, et seq., lists excusable neglect as a statutory defense to a default claim, the only statutory excuse provided by the education employees grievance procedure is "sickness or illness." W. Va. Code § 18-29-3(a). Curiously, however, DOE Exhibit 1, which is those pages of the West Virginia Department of Education Employee Handbook involving the grievance procedure, states the excuses to default as "sickness, injury, excusable neglect, unavoidable cause, or fraud."