JUDITH RHODES,

Grievant,

v. **Docket No. 00-42-233D**

RANDOLPH COUNTY BOARD OF EDUCATION,

Respondent.

ORDER DENYING DEFAULT

Judith Rhodes ("Grievant") initiated this grievance at level one on March 30, 2000, alleging she should not have been reduced in force at the conclusion of the 1999-2000 school year. Grievant alleges that Respondent Randolph County Board of Education ("RCBOE") failed to respond in a timely fashion at level two of the grievance procedure, and she requests that she be granted judgment by default in accordance with the provisions of W. Va. Code § 18-29-3. A hearing was held in the Grievance Board's office in Elkins, West Virginia, on December 4, 2000, for the purpose of determining whether or not a default had occurred. Grievant was represented by counsel, John E. Roush, and RCBOE was represented by counsel, Basil R. Legg, Jr. This matter became mature for consideration upon receipt of the parties' fact/law proposals on December 19, 2000.

The following findings of fact are made from a preponderance of the evidence of record.

Findings of Fact

1. Grievant is employed by RCBOE as a cook.

2. On March 30, 2000, Grievant filed a grievance contesting her reduction in force.

3. After a denial at level one, a level two hearing was scheduled and held on June 8, 2000.

4. At the conclusion of the level two hearing, a discussion took place between the parties' counsel and the grievance evaluator, Cynthia Kolsun, regarding the extension of the deadline for issuance of the level two decision. Ms. Kolsun was going to be out of town during the second week of

July, so the discussion involved the exact date in July upon which Ms. Kolsun would attempt to have the decision issued. The following is an excerpt of that discussion:

Mrs. Kolsun:

You'll have a decision by the 21st. I'll try to get it to you by the 18th, if possible.

Mr. Legg:

Cindy, why don't we shoot for trying to get that out by the 7th, before you go? Are you going to be in the 6th and the 7th, because it will be a short decision?

Mrs. Kolsun: I can shoot for that, but . . .

Mr. Roush:

Your Honor, I mean, if you get Basil's findings of fact and you just wish to adopt them, . . .

* * *

You'll put it in the mail by July 7th?

Mr. Legg: He does have a right to have it five days from today.

Mrs. Kolsun: Okay.

Mr. Legg: The 7th is better than that.

Mr. Roush:

Like I say, that's not going to be a normal practice. This is just an unusual situation.

Mrs. Kolsun: **I'll try to have it by July 7th.**

Level II Tr., pp. 52-53 (emphasis added). 5. On July 17, 2000, Grievant appealed her grievance to level four, within which she asserted a default had occurred at level two.

6. On July 18, 2000, Grievant's counsel received Ms. Kolsun's level two decision via facsimile. The decision was dated July 7, 2000.

Discussion

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, theGrievance 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). The burden of proof is upon the grievant asserting a default has occurred to prove the same by a preponderance of the evidence. Moore v. Dep't of Health and Human Resources, Docket No. 98-HHR-382D (Dec. 8, 1998). If a default has occurred, Grievant is presumed to have prevailed, and is entitled to the relief requested, unless Respondent is able to demonstrate that the remedy requested is either contrary to law or clearly wrong. Jackson, supra; See W. Va. Code § 18-29-3(a). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested 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.

W. Va. Code §18-29-4 provides, in pertinent part, regarding the processing of grievances at level two:

> Within five days of receiving the decision of the immediate supervisor, the grievant may appeal the decision to the chief administrator, and such administrator or his or her designee shall conduct a hearing in accordance with [§18-29-6] of this article within five days of receiving the appeal and shall issue a written decision within five days of such hearing.

Grievant contends that, although the parties did agree to an extension of the statutory requirement that a level two decision be issued within five days, a default occurred, because Ms. Kolsun failed to issue a decision by the agreed upon date of July 7, 2000. Respondent argues that the transcript speaks for itself, and, although stating that she would attempt to have the decision issued by July 7, 2000, she did not guarantee thather decision would be done before July 21, 2000.

This Grievance Board has held on numerous occasions that an agreement to extend the timelines for issuance of a decision is binding upon the parties when made during a formal, recorded hearing and constitutes a valid waiver of the statutory requirement. Parker v. W. Va. Dep't of Health & Human Resources, Docket No. 99-HHR-296D (Nov. 30, 1999); Bowyer v. Bd. of Trustees, Docket No. 99-BOT-197D (July 13, 1999); Jackson, supra. See Duruttya v. Bd. of Educ., 181 W. Va. 203, 382 S.E.2d 40 (1989). 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). 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).

As Respondent has noted, the level two transcript speaks for itself. Although several dates were “bandied about,” Ms. Kolsun stated only that she would “try” to have the decision done by July 7, 2000. The date she stated with certainty for issuance of her decision was July 21, 2000, and she

further stated she would, again, “try” to issue it by July 18, 2000, which was the date Mr. Roush received the decision. Accordingly, Grievant has failed to prove by a preponderance of the evidence that the level two decision was not issued within the agreed upon timeframe. Respondent justifiably relied upon Grievant'scounsel's representations regarding the extension of the statutory deadline, so she is now estopped from claiming a default occurred. Furthermore, Grievant agreed to allow Ms. Kolsun a maximum time frame until July 21, 2000. 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).

Because the lower level proceedings have concluded, this matter will now proceed to a level four hearing on the merits of the grievance. In accordance with the foregoing, the following conclusions of law are made.

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 burden of proof is upon the grievant asserting a default has occurred to prove the same by a preponderance of the evidence. Moore v. Dep't of Health and Human Resources, Docket No. 98-HHR-382D (Dec. 8, 1998).

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

4. The parties may agree to an extension of the statutory time limits for issuance of a decision, which constitutes a valid waiver of the statutory requirements. Parker v. W. Va. Dep't of Health & Human Resources, Docket No. 99-HHR-296D (Nov. 30, 1999); Bowyer v. Bd. of Trustees, Docket No. 99-BOT-197D (July 13, 1999); Jackson v. HancockCounty 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). 6. The level two decision in this

grievance was issued within the time limit agreed upon by the parties at the level two hearing, so Grievant has failed to prove by a preponderance of the evidence that a default occurred.

Accordingly, Grievant's request for a finding of default is **DENIED**. This grievance will remain on the docket of this Grievance Board for further adjudication at level four. **The parties are directed to confer with one another and provide the undersigned with at least three mutually agreeable dates for a level four hearing, within five days of receipt of this Order.** The Grievance Board does not consider this Order to be a final order or decision which is appealable to circuit court under the provisions of W. Va. Code §§18-29-7 or 29A-5-4.

Date: January 17, 2001 _____

DENISE M. SPATAFORE

Administrative Law Judge