KAREN STROTHER and

REBECCA KNIGHT,

Grievants,

v. **Docket No. 01-17-358D**

HARRISON COUNTY BOARD OF EDUCATION,

Respondent.

ORDER DENYING DEFAULT

On May 18, 2001, Karen Strother and Rebecca Knight ("Grievants") appealed to level four of the grievance procedure, alleging they are entitled to prevail by default in their grievances filed against their employer, Respondent Harrison County Board of Education ("HCBOE"). Grievants contend a default occurred at level one. On August 16, 2001, a hearing was held in the Grievance Board's office in Westover, West Virginia. Grievants were represented by William White of the West Virginia Education Association, and Respondent was represented by counsel, Basil R. Legg, Jr. The parties elected not to file written proposals, so this matter became mature for consideration at the conclusion of the hearing.

The default hearing in this matter consisted of testimony from Grievants, the superintendent, Grievant's representative, and Respondent's counsel, who all testified to two very distinct versions of the events which preceded Grievants' default claim. The underlying grievance involves Grievants' contention that they should have received a pay raise which was given to other HCBOE employees who were similarly classified. After the new salary schedule was adopted on April 3, 2001, Grievants spoke to and sent a writtenrequest to the Board members, dated April 10, 2001, questioning why they had not received the same supplement approved for other employees. This letter also attempted to explain Grievants' contentions as to why they believed they were entitled to a similar pay raise.

On the following day, April 11, 2001, Grievants went to the office of Victor Gabriel, Administrative Assistant of Service Personnel, to discuss the salary issue. During that conversation, Superintendent

Friebel just happened to walk in, and a discussion was held between him, Grievants, and Mr. Gabriel. After hearing Grievants' concerns and being asked “what he could do about it,” Superintendent Friebel advised Grievants he would like to seek a legal opinion concerning the matter. He also asked them to state their concerns in writing. Accordingly, Grievants prepared a memorandum that same day, outlining why they believed they should be granted the salary supplement. At no time during the conversation with Superintendent Friebel and Mr. Gabriel did Grievants ever mention invoking the grievance procedure or filing a grievance, nor did they do so in their written memorandum. Nevertheless, Grievants testified that they believed the April 11 meeting constituted their informal conference; Grievant Knight testified she assumed Superintendent Friebel would know this was an informal grievance conference “because of his position.”

After receiving no response to their “informal conference,” on April 30, 2001, Grievants sought to file a written level one grievance. Because their immediate supervisor, Sharon Brisbin, was on a leave of absence at the time, Grievants were somewhat confused as to whom should receive their level one grievance. It is here that the two versions ofevents diverge.

According to Grievants, they went directly to Superintendent Friebel on April 30, seeking to file their written grievance. Because he did not know exactly who should function as their immediate supervisor in Ms. Brisbin's absence, the superintendent handed the form back to them, advising them to inquire of Mr. Legg as to the proper person for filing at level one. Grievants then proceeded to Mr. Legg's office, and Mr. Legg informed them that Superintendent Friebel should function as their level one supervisor and receive the grievance. After receiving this information, Grievants went back to the superintendent's office and gave him the grievance form, explaining Mr. Legg's advice. Superintendent Friebel directed Grievants to have the grievance form date stamped by Sharon Harris, secretary in the personnel office (and Mr. Legg's secretary), who gave them copies. Two weeks later, they had received no response, so this default claim was filed.

Superintendent Friebel's recollection of these events was less than clear. He did recall Grievants bringing the grievance form to him on April 30, but did not really remember whether they brought it to him twice. He also did not recall Grievants informing him that Mr. Legg said that he should receive the grievance as their supervisor. However, he did remember telling Grievants he would like to sit down and talk about the situation, but he forgot about it within a few days. Nevertheless, the superintendent adamantly stated that he did not accept the grievance for filing as their immediate

supervisor, because he knew it was his function to hear the grievance at level two, not level one.

Mr. Legg's version of these events differs radically from Grievants'. When Grievants came to him on April 30 and asked who should receive their level one grievance, he testified that he told them they should file directly at level two, because their level one supervisor was not available. He stated that Grievants agreed to this, and his secretary (Mrs. Harris) stamped the grievance and filed it. As the person who processes level twogrievances, it was Mr. Legg's responsibility to receive the grievance at that level. On May 11, 2001, Mr. Legg sent Grievants a memorandum stating, in part, “per mutual agreement with your representative, I am confirming a continuance of your level two hearing.” Mr. Legg further testified that, in a telephone conversation with Mr. White during the same time period, they discussed rescheduling of several level two grievances, including this one. Mr. White recalled the conversation, but he did not believe that this particular grievance was included in that discussion. In fact, Mr. White recalled Grievants asking him why they had received the memo continuing their grievance at level two, when it had not yet been decided at level one, which he told them to ignore, assuming it was a mistake. Nevertheless, neither Grievants nor Mr. White took any action to diffuse Mr. Legg's apparent assumption that the grievance had been forwarded to level two.

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 forthe 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.

(Emphasis added).

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). In addition, this Grievance Board has recently recognized that it has jurisdiction to determine whether a default has occurred at level one--and the informal conference stage--of the education grievance procedure. Tignor v. Dep't of Educ., Docket No. 99-DOE-468D (Dec. 30, 1999); Wounaris v. Bd. of Directors, 99-BOD-133D (May 18, 1999).

Grievants' claim of default is based upon an assertion that there was no timely response at level one. W. Va. Code §18-29-4(a) provides as follows regarding the grievance procedure at 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 thegrievance 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.
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> (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.
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> (4) The immediate supervisor shall state the decision to such filed grievance within ten days after the grievance is filed.

The burden of proof is upon the grievants 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, Grievants are presumed to have prevailed, and are 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.

As can be seen from the information set forth above, both parties are adamant in their respective versions of the events which allegedly occurred before and when this grievance was filed. Respondent argued at the level four hearing in this matter that,because no informal conference was held, the Grievance Board did not have jurisdiction to hear Grievant's allegation of default at level one. However, Grievants have not claimed a default occurred at the informal conference stage. Nevertheless, Grievants did have some obligation to inform Superintendent Friebel that they were invoking the grievance procedure, and should not have assumed he could read their minds. “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. Logan County Bd. of Educ., 201 W. Va. 305, 316, 496 S.E.2d 447, 458 (1997).

Applying this principle to the instant case, Grievants have caused, or at least contributed to, Respondent's failure to respond, both at the informal conference stage and at level one. There is absolutely no way that Superintendent Friebel or Mr. Gabriel could have or should have known that the discussion which took place with Grievants on April 11, 2001, was the informal conference stage of the grievance procedure. Thus, Grievants acted prematurely when they filed a written level one grievance after they received no “response” to what they believed was an informal conference. In addition, although Grievants vehemently disputed Mr. Legg's version of the events which occurred when they filed their written grievance, Respondent did produce evidence which would tend to support the conclusion that, for whatever reason, Mr. Legg believed the grievance was beingprocessed at level two. Although W. Va. Code § 18-29-3(a) provides that the timelines for filing a grievance may be extended by mutual written agreement, it is not necessary to reduce the

agreement to writing if the parties have verbally agreed, or the Grievants' actions constitute a waiver of the statutory time requirements. Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995); Bowyer v. Bd. of Trustees, Docket No. 99-BOT-197D (July 13, 1999). See also, Hanlon, supra. Similarly, subsection (c) of the same statute allows a grievant to file the grievance "at the level vested with the authority to grant the requested relief if the grievance evaluator. . . agrees in writing[.]" Upon receiving Mr. Legg's communication that the level two hearing in this grievance was being continued per mutual agreement, Grievants or their representative should have taken action to correct Mr. Legg's assumption, rather than acquiescing and encouraging a supposed error.

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 process for resolving problems at the lowest possible administrative level and shall be construed to effectuate this purpose.

(Emphasis added.) Under the facts presented, Grievants could have inquired of Superintendent Friebel after they received no response after the supposed informal conference, or they could have formally stated that they considered this meeting to be such a conference. Moreover, with all the confusion which occurred regarding where the levelone grievance was to be filed, Grievants had an increased responsibility to quickly respond to Mr. Legg's notification regarding their level two hearing if this was, in fact, something to which they had not agreed. "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." Tignor, supra.

The following findings of fact and conclusions of law support the decision reached.

Findings of Fact

1. Grievants are employed by Respondent as secretaries/coordinators in the central office.

2. On April 3, 2001, Respondent adopted a new salary supplement for coordinators, which Grievants did not receive.

3. On April 11, 2001, Grievants went to Victor Gabriel, Administrative Assistant for Service

Personnel, to inquire why they had not received the supplement granted to other coordinators. While they were talking with Mr. Gabriel, Superintendent Carl Friebel came in, and he participated in the discussion. Mr. Friebel advised Grievants that he would like to request a legal opinion on the matter and would get back to them. He also asked them to place their concerns in writing.

4. During the April 11, 2001, discussion Grievants did not mention the grievance procedure, nor did they advise the superintendent or Mr. Gabriel that they considered the meeting to be the informal grievance conference.

5. Grievants filed a written level one grievance on April 30, 2001, with Sharon Harris, secretary in Respondent's personnel office, believing that Superintendent Friebel would accept it as their immediate supervisor. 6. Grievants' immediate supervisor, Sharon Brisbin, was on an extended leave of absence during the time Grievants filed this grievance.

7. No particular person was appointed to function as Grievants' supervisor in Ms. Brisbin's absence, although Grievants were told to refer problems or questions to the superintendent or Basil Legg, board counsel.

8. Superintendent Friebel did not accept the grievance as Grievants' level one supervisor and did not respond to the written grievance.

9. Mr. Legg sent Grievants a memorandum dated May 11, 2001, in which he advised them that, per mutual agreement with their representative, their level two grievance hearing would be continued.

10. Grievants made no effort to correct Mr. Legg's assumption that their grievance had been forwarded to level two, skipping level one of the grievance process, by agreement of the parties.

11. Grievants filed a claim of default at level one on May 15, 2001.

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. Grievants did not request an informal conference prior to filing their level onegrievance.

4. The burden of proof is upon the grievants 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).

5. Grievants have failed to prove by a preponderance of the evidence that a default occurred at level one.

Accordingly, Accordingly, Grievants' request for a determination of default under W. Va. Code § 18-29-3(a) is **DENIED**. This matter is hereby **REMANDED** to level two (See footnote 1) for processing at that level, and it is **DISMISSED** and **STRICKEN** from the docket of this Grievance Board.

Date: September 11, 2001 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

The parties indicated that Ms. Brisbin is still on leave, so it would seem best to avoid any potential confusion by processing this grievance at level two.