DENNIS COLLINS and

ROGER SOWARDS,

Grievants,

v.

Docket No. 02-DOH-150D

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

ORDER DENYING DEFAULT

Grievants attempted to file separate grievances on April 12, 2002, stating: "Discrimination in pay based on Craftworkers getting paid higher wages than mechanics in Lincoln Co. shop." (See footnote 1)

Level I decisions were issued on April 15, 2002 denying the grievances, and Level II hearings were held on the grievances on April 30, 2002. The grievances were denied by a Level II decision issued May 7, 2002. Grievants thereafter filed an undated notice stating, "Due to time limits required by state law, this grievance is in default by the employer." Respondent filed its Request for Hearing on Default Claim at Level IV on May 22, 2002. A Level IV default hearing was held on the consolidated default claims on June 27, 2002, before the undersigned Administrative Law Judge, at the Grievance Board's Charleston office (See footnote 2). Grievants appeared with Roger Sowards serving as representative for both, and Respondent was represented by Barbara Baxter, Esq. The parties elected to file proposed findings of fact and conclusions of law by July 19, 2002, whereupon the matter became mature for decision. The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievants attempted to file separate grievances directly at Level II on April 12, 2002 by delivering them to their District Engineer's office. The grievances alleged county-wide discrimination in pay.

2. Mr. Sowards at first attempted to file the grievances by delivering them to Barbara King, a secretary in the District Engineer's Office.

3. Ms. King, whose duties include processing grievance forms that are filed at Level II, reviewed the forms and returned them, advising Mr. Sowards the grievances must be filed with Grievants' immediate supervisor at Level I.

4. Mr. Sowards twice more attempted to bypass Level I and file the Grievances at Level II, ignoring Ms. King's clear instructions. Ms. King even gave him a copy of the Grievance Code detailing the filing procedure, and advised him that his supervisor couldwaive Level I. Ms. King finally sent a copy of the grievance form to Grievants' immediate supervisor.

5. Ms. King is not a Grievance Evaluator and is not in Grievants' administrative chain of command.

6. Larry Pauley is Grievants' immediate supervisor. He has no control over the rates of pay of his supervisees, except that he occasionally recommends employees for merit pay increases. He has no input on the salaries of other employees in the county that he does not supervise.

7. Larry Pauley denied the grievances at Level I on their merits.

8. A Level II conference was held on April 30, 2002, after which the grievances were denied.

9. Grievants filed their default claim after the Level II decision was issued.

DISCUSSION

Grievants assert that a Level II conference should have been scheduled and held within five days of their first attempts to file at Level II, because Ms. King was not a person designated by District Engineer Wilson Braley to decide grievance matters.

West Virginia Code § 29-6A-3(a) states in part: “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.” If a default has not occurred, the grievant may

proceed to the next level of the grievance procedure. Pennington v. W. Va. Div. of Corrections/Anthony Correctional Center, Docket No. 01-CORR-011D (Feb. 13, 2001). Grievants bear the burden of establishing default bya preponderance of the evidence. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002).

Grievants' claim must fail because Mr. Sowards caused the error they complain of. He claimed the Grievances were not processed timely after his initial attempt to file them, but his attempt to bypass Level I and file directly at Level II was not procedurally correct. He was properly instructed to file it at Level I, and he repeatedly ignored this instruction.

W. Va. Code § 29-6A-4(a) states in part:

> Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant. . . . If a grievance alleges discrimination or retaliation by the immediate supervisor of the grievant, the level one filing may be waived by the grievant and the grievance may be initiated at level two with the administrator or his or her designee, within the time limits set forth in this subsection for filing a grievance at level one. A meeting may be held to discuss the issues in dispute, but the meeting is not required.

Grievants argue that these grievances did allege discrimination, so it was permissible for them to bypass Level I. However, Grievants must read the entire proviso on which they rely, and he ignores the phrase “by the immediate supervisor of the grievant.” Grievants do not allege discrimination by Mr. Pauley, but make broad allegations regarding pay differences within classifications, so they may not unilaterally bypass Level I.

This Grievance Board has held:

> 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 adverseconsequences."); 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).)."

Gerencir v. Kanawha County Bd. of Educ., Docket No. 01-20-500D (Nov. 30, 2001), citing Hanlon v. County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997). Grievants' failure to properly file their

claims is the reason Respondent did not make a Level II response after they did so. Respondent had no obligation to make a response to an improperly-filed grievance.

Grievants' claim for relief by default is also untimely. While W. Va. Code § 29-6A- 3(a)(2) (recited above) does not specify a time within which one must file a notice of default, the Supreme Court of Appeals of West Virginia has held that, “In order to benefit from the "relief by default" provisions contained in W. Va. Code § 18-29-3(a) (1992) (Repl. Vol. 1994), a grieved employee or his/her representative must raise the "relief by default" issue during the grievance proceedings as soon as the employee or his/her representative becomes aware of such default.” Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997); Harmon v. Fayette County Bd. of Educ., 205 W. Va. 125, 516 S.E.2d 748 (1999). Grievants waited until after receiving and unfavorable Level II decision before claiming a default occurred at Level I. By failing to claim default as soon as they believed it had occurred, they waived the right to do so.

In addition to the foregoing discussion, the following conclusions of law are appropriate in this matter.

CONCLUSIONS OF LAW

1. Grievant bears the burden of establishing default by a preponderance of the evidence. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002).

2. If a default has occurred, a grievant is presumed to have prevailed on the merits of the grievance, and Respondent may request a ruling at Level IV to determine whether the relief requested is contrary to law or clearly wrong. If a default has not occurred, the grievant may proceed to the next level of the grievance procedure. Pennington, *supra.*

3. In order to benefit from the "relief by default" provisions contained in W. Va. Code § 29-6A-3(a)(2), a grieved employee or his/her representative must raise the "relief by default" issue during the grievance proceedings as soon as the employee or his/her representative becomes aware of such default. Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997); Harmon v. Fayette County Bd. of Educ., 205 W. Va. 125, 516 S.E.2d 748 (1999).

4. Grievants did not give timely notice of the default.

5. W. Va. Code § 29-6A-4(a) states in part:

> Within ten days following the occurrence of the event upon which the grievance is

> based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant. . . . If a grievance alleges discrimination or retaliation by the immediate supervisor of the grievant, the level one filing may be waived by the grievant and the grievance may be initiated at level two with the administrator or his or her designee, within the time limits set forth in this subsection for filing a grievance at level one. A meeting may be held to discuss the issues in dispute, but the meeting is not required.

6. Grievants did not allege discrimination by their immediate supervisor, and so were not entitled to unilaterally bypass Level I. Respondent has no obligation to respond to an improperly-filed grievance.

7.

> 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).).

Gerencir v. Kanawha County Bd. of Educ., Docket No. 01-20-500D (Nov. 30, 2001), citing Hanlon v. County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997).

8. Grievants were the cause of Respondent's failure to process this grievance immediately after the initial attempt to file it directly at Level II.

Accordingly, Grievants' request for a determination of default under W. Va. Code § 29-6A-3(a) is **DENIED**. This matter is hereby **REMANDED** to Level III for processing at that level, and it is **DISMISSED** and **STRICKEN** from the docket of this Grievance Board.

DATED: August 26, 2002 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1 *Mr. Collins' grievance additionally stated, "Higher paid Craftworkers and a mechanic [were] brought into shop without job posting or bidding."*

Footnote: 2 *A similar default claim was filed in the matter of John Collins v. W. Va. Dep't of Trans./Div. of Highways, Docket No. 02-DOH-149D, based on a separate grievance but almost identical facts relating to the default claim. Due to the similarity of evidence and witnesses, the default claims were combined for purposes of hearing.*