CAROLYN KINCAID,

Grievant,

V.

DOCKET NO. 02-10-159D

FAYETTE COUNTY BOARD OF EDUCATION,

Respondent.

ORDER DENYING DEFAULT

Grievant, Carolyn Kincaid, filed a motion for default at level four on June 5, 2002, against her employer, the Fayette County Board of Education ("Board"), claiming it defaulted on her grievance at level two. A hearing was held on the default issue in the Grievance Board's Beckley, West Virginia, office, on July 8, 2002. Grievant was represented by her husband, Douglas Kincaid, who is also the Board's Director of Personnel, and the Board was represented by Erwin L. Conrad, Esq., Conrad & Clay. This matter became mature for decision at the close of the hearing.

The material facts in this matter are not in dispute, and are set forth in the following findings.

FINDINGS OF FACT

1. Grievant filed a grievance against the Board on May 10, 2002.

2. Her principal rendered a decision on May 13, 2002, and Grievant appealed to level two on May 20, 2002. 3. On May 21, 2002, Douglas Kincaid, Grievant's husband, and the Director of Personnel, notified Superintendent Charles Garvin that he would be representing Grievant, and that Grievant was not waiving the time lines for the scheduling of a level two hearing. LIV G. Ex. 2.

4. On May 22, 2002, Grievant wrote to Superintendent Garvin requesting that subpoenas be issued when he scheduled the level two hearing. LIV G. Ex. 3.

5. Superintendent Garvin was out of the office on May 20 and 21, and did not see the grievance filing until May 22, 2002.

6. Superintendent Garvin instructed Associate Superintendent Peggy Freeman, to schedule a level two hearing. Ms. Freeman contacted the Board's attorney, a court reporter, and after several attempts, located a grievance evaluator, and scheduled the level two hearing for May 24, 2002. (See footnote 1) Ms. Freeman did not contact Grievant or her representative before scheduling the hearing.

7. Ms. Freeman hand-delivered a letter from Superintendent Garvin to Grievant on May 23, 2002, notifying her of the level two hearing scheduled for the 24th. LIV G. Ex. 1.

8. Grievant informed Ms. Freeman that 24 hours was not enough time to prepare for the hearing, and moreover, her husband had a scheduled medical appointmentfor that day. Grievant told Ms. Freeman to ask Superintendent Garvin for a continuance, and to schedule the hearing for the next working day, May 28, 2002, at 4:00 p.m. (See footnote 2)

9. The May 24, 2002 hearing was not continued, but Grievant and Mr. Kincaid did not appear.

10. Grievant wrote Superintendent Garvin on May 24, 2002, informing him that she and her husband were unavailable for the hearing that day, and was upset that he “arbitrarily” set the hearing without consulting either one of them. LIV Jt. Ex. 1.

11. The level two hearing was not set for May 28, 2002, but Grievant and Mr. Kincaid showed up at the office. After about 15 minutes, Superintendent Garvin came in and told them he had not scheduled the hearing for that day, but wanted to schedule it on a mutually agreeable date.

12. On June 4, 2002, Grievant notified Superintendent Garvin and the Grievance Board in writing that she considered the Board to be in default for failing to schedule her level two hearing within the statutory time frame. LIV Jt. Ex. 1.

13. On June 7, 2002, Superintendent Garvin wrote to Grievant, again expressing his desire to schedule a level two hearing on a mutually agreeable date. LIV Jt. Ex. 1.

DISCUSSION

The issue of default in grievances filed by education employees is within the jurisdiction of the Grievance Board. W. Va. Code § 18-29-3(a) states the following:

> (a) 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 ... [§ 18-29-4] ... of this article shall be considered 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 ... [§ 18A-4-10] ... of this code. 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. 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 a claim of default, the grievant bears the burden of establishing that he prevailed by default by a preponderance of the evidence. Friend v. W. Va. Dept. of Health and 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 than the 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). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

This Grievance Board has clarified in its procedural rules the method by which parties may seek default and subsequent relief with the Board at 156 C.S.R. 1.5.1.

> 5.1. A grievant seeking to prevail by default must file a written claim seeking relief by default with his or her employer and may, at the same time, file the claim with the Board. After the employer receives the written claim for default, it may file a request for a hearing with the Board within five workingdays. Upon receipt of a claim for relief by default, the Board will place the claim for default on its docket, assign a docket number, and set the claim for hearing. The issues to be decided may include whether a default has occurred at Levels One, Two or Three, whether the employer has a statutory excuse for not responding within the time required by law and/or whether the relief sought is contrary to law or clearly wrong. Once a grievant files a written claim for relief by default with the Board at Level Four, all proceedings at the lower levels are automatically stayed until all default matters have been ruled upon at Level Four, unless all parties agree in writing that lower level proceedings can go forward. Mediation services shall continue to be available while default matters are pending.

Grievant claims she has prevailed by default because the Board failed to schedule a level two hearing on her grievance within the statutory time frames. Specifically, with regard to proceedings at level two under the grievance procedure for education employees, W. Va. Code § 18-29-4(b) provides as follows:

> 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.

The fifth day following Grievant's appeal to level two was May 28, 2002, and the last day upon which a hearing could be conducted and be in compliance with the Code. There is no dispute that a level two hearing was not conducted before or on that date. Superintendent Garvin, through Ms. Freeman, did attempt to schedule one before the end of the five-day period, however, it was not convened because Grievant did not show up. It is evident that Grievant and her representative were insulted that Ms. Freeman did not contact them before attempting to schedule the level two hearing, and thereafter were not inclined to cooperate with any further efforts to schedule the hearing. Ms. Freeman testified that when trying to schedule the hearing, May 24, 2002, was the only day withinthe five-day period that she could get a grievance evaluator. When Grievant refused to waive the five-day period, and demanded the hearing be held on Tuesday, May 28, 2002, at 4:00 p.m., there simply was no grievance evaluator available to hold the hearing. Grievant alleges she has prevailed by default by Superintendent Garvin's failure to hold a hearing within the five day statutory period.

The time periods in the grievance procedure are not jurisdictional in nature and can be waived by the parties. W. Va. Code § 18-29-3(a). See Plumley v. W. Va. Div. of Natural Resources, Docket No. 00-DNR-091D (June 22, 2000); Skeens v. Lincoln County Bd. of Educ., Docket No. 99-22-171 (Aug. 31, 1999); Jackson v. Hancock County Bd. of Educ., Docket No. 99-15-081D (May 5, 1999). A party 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. Rhodes v. Randolph County Bd. of Educ., Docket No. 000-42-233D (Jan. 17, 2001); Jones v. Dept. of Educ., Docket No. 99-DOE-495D (Jan. 3, 2000); Lambert v. W. Va. Dept. of Health & Human Res., Docket No. 99-HHR-326D (Oct. 14, 1999). In this instance, the failure to conduct a level two hearing within the statutory period must be attributed, at least in part, to Grievant's refusal to meet with Superintendent Garvin on May 24, 2002, and demanding a hearing be scheduled on a day when no grievance evaluator was available. To hold the Board in default in these circumstances would encourage grievants to refuse to cooperate with their employers as a means of obtaining relief without providing evidence to support their claims. Akers v. Higher Education Interim Governing Bd., Docket No. 01- HE-039D (May 3, 2001); See Harmon v. Div. of Corrections, Docket No. 98-CORR-284D (Oct. 6, 1998); Brown v. W. Va. State Bd. of

Directors/Bluefield State College, Docket No.92-BOD-128 (Mar. 30, 1994); Jack v W. Va. Div. of Human Serv., Docket No. 90-DHS-524 (May 14, 1991).

CONCLUSIONS OF LAW

1. In a claim of default, the grievant bears the burden of establishing that he prevailed by default by a preponderance of the evidence. Friend v. W. Va. Dept. of Health and Human Resources, Docket No. 98-HHR-346D (Nov. 25, 1998).

2. With regard to proceedings at level two under the grievance procedure for education employees, W. Va. Code § 18-29-4(b) provides as follows:

> 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.

3. The time periods in the grievance procedure are not jurisdictional in nature and can be waived by the parties. W. Va. Code § 18-29-3(a). See Plumley v. W. Va. Div. of Natural Resources, Docket No. 00-DNR-091D (June 22, 2000); Skeens v. Lincoln County Bd. of Educ., Docket No. 99-22-171 (Aug. 31, 1999); Jackson v. Hancock County Bd. of Educ., Docket No. 99-15-081D (May 5, 1999).

4. A party 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. Rhodes v. Randolph County Bd. of Educ., Docket No. 000-42-233D (Jan. 17, 2001); Jones v. Dept. of Educ., Docket No. 99-DOE-495D (Jan. 3, 2000); Lambert v. W. Va. Dept. of Health & Human Res., Docket No. 99-HHR-326D (Oct. 14, 1999). 5. The evidence demonstrates that Superintendent Garvin, through Ms. Freeman, scheduled the level two hearing within the five-day statutory time frame. When Grievant was unable to make the scheduled date, she demanded the hearing be held on another date, when a grievance evaluator was not available. In this instance, Grievant's own refusal to cooperate in scheduling the level two hearing contributed to or created the problem.

Accordingly, Grievant's claim for default is DENIED, and this case is remanded to the Board for scheduling of a level two evidentiary hearing.

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MARY JO SWARTZ

Administrative Law Judge

Dated: July 18, 2002

Footnote: 1

Ms. Freeman would normally have acted as the grievance evaluator, but because the grievance involved some of her colleagues, she felt uncomfortable acting in that role, and decided to secure another grievance evaluator.

Footnote: 2

May 24, 2002, was a Friday. Monday, May 27, 2002, was Memorial Day, and the next working day was Tuesday, May 28, 2002.