REBECCA SPROUT,

Grievant,

v. **Docket No. 03-17-010D**

HARRISON COUNTY BOARD OF EDUCATION,

Respondent.

ORDER DENYING DEFAULT

This matter was brought before this Grievance Board by request of Respondent Harrison County Board of Education ("HCBOE") dated January 10, 2003, for a hearing regarding Grievant's allegation that a default had occurred at level two. A hearing was held at the Grievance Board's office in Westover, West Virginia, on June 17, 2003, for the purpose of determining whether or not a default had occurred. Grievant was represented by counsel, Kimberly Levy, and Respondent was represented by counsel, Alyssa Sloan. This matter became mature upon receipt of the parties' fact/law proposals on July 11, 2003.

The following findings of fact are made based upon a preponderance of the credible evidence of record.

Findings of Fact

1. Grievant filed a written level one grievance with her immediate supervisor on August 14, 2000, claiming entitlement to prior work experience credit.

2. On August 21, 2000, Grievant's supervisor issued a level one decision, stating he did not have the authority to rule on her grievance. 3. Grievant hand delivered her level two appeal form to Respondent's personnel department on August 22, 2000, as reflected by the date stamp.

4. At the time she filed the level two appeal of her work experience grievance, Grievant had another grievance pending regarding a salary supplement for her work as yearbook sponsor. The yearbook grievance had not yet been scheduled for a level two hearing.

5. Attorney John Roush of the West Virginia School Service Personnel Association was representing Grievant in the yearbook grievance, and Respondent's counsel, Basil Legg, knew this.

6. Grievant filed the work experience grievance without notifying her attorney.

7. Mr. Legg telephoned Mr. Roush some time in late August of 2000 (See footnote 1) to schedule this grievance for a level two hearing. At the time of the phone conversation, Mr. Roush did not know Grievant had filed a grievance regarding prior work experience, and he believed they were scheduling the yearbook grievance. They agreed that the hearing would be scheduled for September 19, 2000.

8. Mr. Legg and Mr. Roush work together quite often, and it is common practice between them to schedule level two hearings beyond the five-day statutory time limit, with the Grievant's agreement to waive the requirement.

9. The notice for the September 19 hearing, dated September 6, was mistakenly sent to Bill White of the West Virginia Education Association by the secretary who preparedit, although Mr. Legg knew that Grievant was represented by Mr. Roush. On September 14, 2000, Grievant sent Mr. Legg a letter, notifying him of the error.

10. Grievant also spoke with Mr. Legg by phone on September 14, 2000, regarding the mistake on the notice, and to make sure he knew that she was represented by Mr. Roush. Mr. Legg informed Grievant at that time that he knew Mr. Roush was representing her and that he had agreed to the hearing date.

11. Grievant spoke with her attorney's office by phone on September 14, 2000, regarding the erroneous notice. It was at this time that Grievant's counsel was first informed that she had filed a second grievance.

12. Also on September 14, 2000, Grievant filed a written notice of default, addressed to Superintendent Carl Friebel, which stated: "According to my calculations, I have had no response from the [Board] concerning this grievance at Level II, and have not been notified of a hearing date for Level III. Therefore, according to the law, I have won this grievance by default."

13. The default letter addressed to Dr. Friebel reflected that carbon copies were sent to Mr. Legg and Sharon Brisbin, Personnel Director, but no copies of this letter were contained in their files regarding this grievance.

14. Upon learning that the September 19 hearing was for the work experience grievance, Mr. Roush requested a continuance to prepare for the hearing.

15. Subsequent to the agreed continuance of the September 19, 2000, hearing the parties to this grievance began settlement negotiations, which were ongoing for several months. 16. By

letter dated February 12, 2001, Mr. Roush informed Dr. Brisbin that Grievant was asserting default in both of her grievances, and asking that a level two hearing on the issue of default and the merits of the cases be scheduled. He also requested that the default notice not be viewed as evidence of a desire to terminate the ongoing efforts to settle the cases.

17. Upon receiving Mr. Roush's notice of default, Mr. Legg filed a request for hearing regarding the default(s) with the Grievance Board on March 2, 2001.

18. Subsequent to Mr. Legg's filing at level four, the parties agreed to proceed at level two, and a level two hearing was held on November 7, 2002. Counsel agreed that the default issue would be delayed until the grievance reached level four.

19. A civil lawsuit was filed by Grievant regarding the settlement of this grievance, which delayed the level four appeal for a lengthy period of time.

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.

W. Va. Code §18-29-4 provides that, at level two, a hearing shall be conducted within five days of receipt of the appeal.

The burden of proof is upon the grievant who claims a default to prove by a preponderance of the

evidence that a default has occurred. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002). Where Respondent asserts a statutory excuse to the default, the burden of proof is upon Respondent to prove the same by a preponderance of the evidence. 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.

Grievant contends that Respondent defaulted with regard to the date of the level two hearing, which undisputedly did not take place within five days of her appeal. However, Respondent counters that, pursuant to its normal practice with Mr. Roush, a date for the hearing was agreed upon, which was not within the statutory time frame. Although Grievant's counsel was unaware at that time that a new grievance had been filed, Respondent argues that its reliance on Mr. Roush's agreement regarding the date for thehearing was justified, prohibiting Grievant from claiming default. In addition, Respondent contends that, because Grievant's counsel waited until February of 2001 to raise the default issue, she has waited too long to assert a default claim.

Respondent contends that, by agreeing to schedule the level two hearing beyond the statutory five days, Mr. Roush waived Grievant's right to a hearing within that time frame. The concept of an actual waiver of one's established rights implies a voluntary act. Smith v. Bell, 129 W. Va. 749, 760, 41 S.E.2d 695, 700 (1947). "'A waiver of legal rights will not be implied except upon clear and unmistakable proof of an intention to waive such rights.' . . . Furthermore, 'the burden of proof to establish waiver is on the party claiming the benefit of such waiver, and is never presumed.'" (Citations omitted). Potesta v. U.S. Fidelity & Guar. Co., 202 W. Va. 308, 315, 504 S.E.2d 135, 142 (1998).

It has been held by this Grievance Board that timelines may be extended by the actions of the grievant and by the agreements of the parties, such as rescheduling of hearing dates beyond the statutory timeframe. Gerencir v. Kanawha County Bd. of Educ., Docket No. 01-20-500D (Nov. 30, 2001); Mullins v. Kanawha County Bd. of Educ., Docket No. 01-20-038D (Apr. 10, 2001). Further, "[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). The instant case involves a situation somewhat similar to that which was addressed in the recent decision of Bennett v. Randolph County Board of Education, Docket No. 03- 42-071D (May 12, 2003). In that case, Grievant and the superintendent's secretary had several phone conversations regarding scheduling of the level two hearing, and Grievant contended that he had objected to the hearing date as being beyond the five-day time limit. However, the undersigned administrative law judge found Grievant's testimony not to be credible, and concluded that “through his agreement to a hearing date beyond the required time limit, Grievant waived his right to a hearing within five days.”

The Grievance Board has been directed in the past that "the grievance process is intended to be a fair, expeditious, and simple procedure, and not a 'procedural quagmire.'" Harmon v. Fayette County Bd. of Educ., Docket No. 98-10-111 (July 9, 1998), citing Spahr v. Preston County Bd. of Educ., 182 W. Va. 726, 393 S.E.2d 739 (1990), and Duruttya v. Bd. of Educ., 181 W. Va. 203, 382 S.E.2d 40 (1989). See Watts v. Lincoln County Bd. of Educ., Docket No. 98-22-375 (Jan. 22, 1999). As stated in Duruttya, supra, "the grievance process is for 'resolving problems at the lowest possible administrative level.'" Additionally, Spahr, supra, indicates the merits of the case are not to be forgotten. Id. at 743. See Edwards v. Mingo County Bd. of Educ., Docket No. 95-29-472 (Mar. 19, 1996). Further, Duruttya, supra, noted that in the absence of bad faith, substantial compliance is deemed acceptable. Morrison v. Div. of Labor, Docket No. 99-LABOR-146D (June 18, 1999). See also Deel v. Bureau of Employment Programs, Docket No. 00-BEP-256D (Nov. 17, 2000).

The instant case is a perfect example of the “procedural quagmire” that the grievance procedure is not meant to be. Mr. Legg credibly testified that he timely contacted Mr. Roush, whom he knew was representing Grievant, to schedule the level twohearing. As was their usual practice, the parties agreed upon a date beyond the five-day time limit, which both attorneys testified is seldom possible. The evidence establishes that Respondent acted in good faith and processed the grievance quickly and responsibly. None of the parties could have foreseen that Mr. Roush was completely unaware that a new grievance had been filed by his client on her own, and that he believed a different

grievance was being scheduled. Moreover, Grievant had phone conversations with her counsel and with Mr. Legg after the hearing notice was received, and never mentioned a default claim. Then, upon discovering that a new grievance had been filed by Grievant on her own, Mr. Roush discussed a continuance with Mr. Legg, again failing to mention a default claim. Finally, although Grievant's initial default notice reflects that it was copied to both Mr. Legg and Dr. Brisbin, there is no evidence that they received it, and Dr. Friebel was not called by Grievant to testify to his receipt of the document or what he may have done with it.

In addition, as Respondent has noted, an employee is allowed to pursue a default claim only if he raises it as soon as he becomes aware of the default. Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997); Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995). The grievant is also required to submit the default claim before a response to the grievance has been received. Harmon v. Fayette County Bd. of Educ., 205 W. Va. 125, 516 S.E.2d 748 (1999). In this case, Grievant knew by the end of August, 2000, that the level two hearing had not yet been scheduled, yet waited until at least mid-September to file a notice of default, which she admitted was filed after she had received her hearing notice. Then, for reasons which are unknown, Grievant's counsel filed a “formal” notice of default in February of 2001, manymonths after the level two had been filed, continuances had been discussed and granted, and settlement negotiations had been ongoing. Accordingly, Grievant did not timely raise her claim of default.

The following conclusions of law support the decision reached.

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 who claims a default to prove by a preponderance of the evidence that a default has occurred. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002). If the grievant establishes that the required response was not made in a timely manner, Respondent may then show that the delay was due to a statutory excuse or that Grievant agreed to waive the time lines. Donellan, supra.

3. W. Va. Code §18-29-4 provides that, at level two, a hearing shall be conducted within five

days of receipt of the appeal.

4. Timelines may be extended by the actions of the grievant and by the agreements of the parties, such as rescheduling of hearing dates beyond the statutory timeframe. Gerencir v. Kanawha County Bd. of Educ., Docket No. 01-20-500D (Nov. 30, 2001); Mullins v. Kanawha County Bd. of Educ., Docket No. 01-20-038D (Apr. 10, 2001). 5. Grievant and her counsel waived the time limit for holding a level two hearing. 6. An employee is allowed to pursue a default claim only if he raises it as soon as he becomes aware of the default. Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997); Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995). The grievant is also required to submit the default claim before a response to the grievance has been received. Harmon v. Fayette County Bd. of Educ., 205 W. Va. 125, 516 S.E.2d 748 (1999).

7. Grievant did not timely raise the issue of default and did not assert it until after the level two hearing had been scheduled, prohibiting her from asserting a default claim.

Accordingly, Grievant's request for relief by default is **DENIED**. The parties are directed to confer with one another and provide the undersigned with four potential dates for scheduling the level four hearing in this matter, no later than **August 5, 2003.**

Date: July 21, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Neither of the attorneys could remember an exact date for this phone conversation.