ROBERT ADKINS,

Grievant,

v. **Docket No. 03-ABCA-113D**

WEST VIRGINIA ALCOHOL BEVERAGE

CONTROL ADMINISTRATION,

Respondent.

ORDER DENYING DEFAULT

Grievant filed a motion for default with his employer, the West Virginia Alcohol Beverage Control Administration ("ABCA"), on April 15, 2003, claiming the agency defaulted at Level III. ABCA requested a Level IV hearing on April 22, 2003. The underlying grievance deals with a suspension. After several continuances, a Level IV hearing was held July 29, 2003, at the Grievance Board's Charleston Office, but the recording equipment failed to record the hearing. A telephone conference to discuss the issue was held on August 11, 2003, and the parties agreed to submit the default case for decision on stipulations. This case became mature for decision on August 27, 2003, the date of receipt of the parties' stipulations. (See footnote 1)

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

Stipulations

1. By agreement between the parties, [t]he Level III hearing in this matter was held on January 3, 2003[,] before Hearing Examiner Jack McClung. 2. At the conclusion of the hearing, the parties agreed to submit written arguments to the Hearing Examiner. The parties agreed to submit said written arguments to the Hearing Examiner by January 27, 2003.

3. The Grievant's counsel contacted the Hearing Examiner and requested an extension to file his written arguments after January 27, 2003. Said request was granted by the Hearing Examiner. (See footnote 2)

4. On February 7, 2003, the Grievant's counsel submitted his written arguments to the ABCA[,]

and the ABCA received said arguments on February 10, 2003. The Grievant's counsel did not submit his written arguments to the Hearing Examiner.

5. On April 15, 2003, the Grievant's counsel filed a written motion for default asserting that the Hearing Examiner failed to render a ruling within the obligatory five-day time frame.

6. It was later learned by both parties that the Hearing Examiner never issued his Level III decision because he was waiting to receive the Grievant's written arguments.

Discussion

W. Va. Code § 29-6A-4 sets forth the time lines to be followed at each level of the grievance procedure. The time lines for Level III require the chief administrator, or his or her designee, to hold a hearing in accordance with section six of this article within sevendays of receiving the appeal, and to issue a written decision affirming, modifying or reversing the level two decision within five days of the hearing.

The burden of proof is upon the grievant asserting a default has occurred to prove the same by a preponderance of the evidence. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003 (Sept. 20, 2002). 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.

If a default occurs, Grievant is presumed to have prevailed. W. Va. Code § 29-6A- 3(a)(2); Carter v. W. Va. Div. of Corrections, Docket No. 99-CORR-147D (June 4, 1999); Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D2 (Jan. 6, 1999). Of course, if ABCA can demonstrate a default has not occurred, or can demonstrate it was prevented from meeting the timelines for one of the reasons listed in W. Va. Code § 29-6A- 3(a), or the remedy requested is either contrary to law or clearly wrong, Grievant will not receive the requested relief. W. Va. Code § 29-6A-3(a)(2); Carter v. W. Va. Div. of Corrections, Docket No. 99-CORR-147D (June 4, 1999); Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D2 (Jan. 6, 1999). If there is no default, Grievant may proceed to the next level of the grievance procedure.

W. Va. Code § 29-6A-3(a) provides, in pertinent part:

The grievant prevails by default if a grievance evaluator required to respond to a grievance at any level fails to make arequired 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. Within five days of the receipt of a written notice of the 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 the presumption. If the examiner finds that the remedy is contrary to law, or clearly wrong, the examiner may modify the remedy to be granted to comply with the law and to make the grievant whole.

Grievant asserts the Level III decision was not issued in a timely manner. Respondent argues the Level III decision was not issued because Grievant never submitted his brief to the Hearing Examiner, and the Hearing Examiner was waiting for Grievant's argument before he issued his decision.

No default occurred in this case because the five-day time period did not begin to run, and would not begin to run until the Hearing Examiner received Grievant's brief. After granting Grievant's request for an extension, the Hearing Examiner was bound by this decision, and he was correct to wait until this material was received before he wrote his decision. The fact that Grievant's brief was received by ABCA on February 10, 2003, does not change the outcome of this decision. ABCA had no way of knowing this material was other than the agency's copy, or that Grievant expected ABCA to send the brief to the Hearing Examiner.

Additionally, this situation was created by Grievant's attorney's sending his brief to ABCA instead of the Hearing Examiner. A party simply cannot acquiesce to, or be the source of, an error during proceedings before a tribunal, and then complain of that errorat a later date. Rhodes v. Randolph County Bd. of Educ., Docket No. 00-42-133D (Jan. 17, 2001); Lambert v. W. Va. Dep't of Health and Human Resources, Docket No. 99-HHR- 326D (Oct. 14, 1999). 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)("[I]t is not appropriate for an appellate body to grant relief to a party who invites error in a lower tribunal.")(Citations omitted).

The following conclusions of law support the decision reached.

Conclusions of Law

1. "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." W. Va. Code § 29-6A-3(a)(2).

2. A written decision must be issued at level three within five working days of the date the level three grievance hearing. W. Va. Code §§ 29-6A-4(a).

3. 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. Rhodes v. Randolph County Bd. of Educ., Docket No. 00-42-133D (Jan. 17, 2001); Lambert v. W. Va. Dep't of Health and Human Resources, Docket No. 99-HHR-326D (Oct. 14, 1999). 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 errorto set aside its immediate and adverse consequences."); Smith v. Bechtold, 190 W. Va. 315, 319, 438 S.E.2d 347, 351 (1993)("[I]t is not appropriate for an appellate body to grant relief to a party who invites error in a lower tribunal.")(Citations omitted).

4. Given this set of facts, the five working day time period for the Hearing Examiner to issue his decision could not begin to run until Grievant submitted his brief or informed the Hearing Examiner he was not going to do so.

Accordingly, Grievant's request that a default be entered is **DENIED**. Grievant's attorney is directed to send the Hearing Examiner a copy of his brief forthwith, and Respondent is Ordered to issue a level three decision within five days from the receipt of this brief.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: September 12, 2003

Footnote: 1

Grievant was represented by Thomas Smith, Esq., and Respondent was represented by Steven Dragisich, Esq., Assistant Attorney General.

Footnote: 2

The parties did not state whether Grievant's attorney was given a date certain or just given an extension.