REBECCA SPROUT,

Grievant,

v. **Docket No. 02-17-375D**

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 November 12, 2002, 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. On April 13, 2000, Grievant filed a written grievance claiming entitlement to a stipend for her work as a yearbook adviser. Her grievance form was filed by SharonDouglas, an officer in the local school service personnel association, who placed it on the desk of Dr. Sharon Brisbin, Supervisor of Personnel.

2. Dr. Brisbin is not Grievant's immediate supervisor. Upon receiving the grievance form on April 13, Dr. Brisbin date stamped it and forwarded it to Grievant's supervisor, Principal Ed Propst, by fax dated April 14, 2000. She attached a note to Mr. Propst advising him that, if he did not have the authority to rule in the issue, to merely write a memorandum stating as much.

3. Grievant prepared the level one response for Principal Propst's signature, and it was dated April 13, 2000. (See footnote 1)

4. The level one response was directed to Dr. Brisbin, rather than to Grievant. Grievant placed the level one response in the “pony”, which is the mail bag which goes from each school to the central office.

5. Grievant's level two grievance form was dated July 20, 2000.

6. Attorney John Roush began representing Grievant by late August of 2000.

7. Grievant filed a second grievance regarding a separate matter on or about August 14, 2000.

8. During either the last week of August or the first week of September, 2000, Mr. Roush and Respondent's attorney, Basil Legg, (See footnote 2) spoke over the telephone aboutscheduling her other grievance for a level two hearing. That hearing was scheduled for September 19, 2000.

9. At the time the level two hearing for the other case was scheduled, Mr. Roush believed that the parties were scheduling the instant grievance for hearing.

10. In mid-September, upon discovering that the September 19 hearing was for the other grievance, Mr. Roush asked for a continuance of that hearing.

11. Settlement negotiations in both grievances began in the fall of 2000.

12. By letter dated February 12, 2001, Mr. Roush informed Dr. Brisbin that Grievant was asserting default in both of her grievances, and asked 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.

13. 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.

14. 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. Accordingly, Mr. Legg filed a request for default hearing again on November 12, 2002.

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 beconsidered 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. Respondent contends that, although a technical default may have occurred in this case, Grievant waited many months to file a written claim of default. 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).

It is obvious in the instant case that Grievant knew about the default by July of 2000, at the latest.

Although her testimony was not corroborated by any other witness, Grievant claimed that, after she filed the level two appeal with Principal Propst's level one response on April 14, 2000, (See footnote 3) she did not hear anything about a level two hearing being scheduled. According to Grievant, she phoned Dr. Brisbin's office and was informed that her file had been "lost", a claim which Dr. Brisbin denies. Grievant testified that this is what prompted her to file another copy of her level two appeal with the central office on July 20, 2000. Clearly, Grievant knew at this point that a default had occurred, yet she did not raise the issue until February of the following year. Moreover, by sending the level one response to Dr. Brisbin, when it should have been addressed to Grievant, and attaching the level two appeal to that response, Grievant has played a part in creating confusion which likely delayed or prevented the processing of her appeal at level two. “A party simply cannot acquiesce to, or be the source of, an error during proceedings before a tribunal and thencomplain 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).

In addition, the evidence establishes that the parties were engaged in settlement negotiations regarding this grievance beginning in the fall of 2000, which were ongoing for several months. It has been previously recognized by this Grievance Board on many occasions that, when a grievance evaluator has taken steps to resolve the grievance, even if it results in a technical default, it is considered substantial compliance with the statutory time limits. Thomas v. Clay County Health Dep't, Docket No. 01-CCHD-422D (Sept. 26, 2001). As stated in Goff v. West Virginia Department of Transportation, Docket No. 02- DOH-245D (Sept. 10, 2002), "to find a default because the Grievance Evaluator failed to fully comply with the procedural requirements would raise form over substance in contravention of the intent of the grievance procedure." That case also involved a situation where the evaluator believed the issue had been resolved and verbally informed the grievant of his decision, believing no further proceedings were necessary, which was found to be substantial compliance.

Respondent has raised the issue of the allegedly untimely filing of this grievance at level one as a defense to this default claim, arguing that it renders the entire grievance moot. However, whether or

not the grievance is untimely would be an appropriate defenseto Grievant's claims on the merits of the case, and is not an excuse for failure to respond as required under the grievance statute. As stated in Wounaris v. Board of Directors/West Virginia State College, Docket No. 99-BOD-033D (May 18, 1999), even if an employer believed the grievance was not timely filed, "that did not excuse it from responding to, and processing, the grievance form in some way." Accordingly, Respondent's timeliness defense may be asserted and addressed when this case is addressed on the merits, and it does not prohibit the undersigned from ruling on Grievant's default claim.

Clearly, Grievant's failure to timely assert the default issue, along with the confusion regarding which grievance was being scheduled and the ensuing settlement negotiations, prohibits a finding of default in this case. 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. 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).

5. Grievant did not timely raise the issue of default with regard to the level two hearing in this case.

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 30, 2003 _____

DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Obviously, this response could not have been prepared before April 14, 2000, when the fax was sent to Mr. Propst by Dr. Brisbin.

Footnote: 2

Mr. Roush and Mr. Legg, who would normally represent the parties to this grievance, were both witnesses during the level four default hearing, so other counsel was retained.

Footnote: 3

Grievant testified that she sent the level two form with Mr. Propst's response to Dr. Brisbin in the "pony" on April 14.