FRANK LEWIS,

Grievant,

v. **Docket No. 03-HHR-203D**

WEST VIRGINIA DEPARTMENT OF

HEALTH AND HUMAN RESOURCES/

BUREAU FOR CHILD SUPPORT ENFORCEMENT

and DIVISION OF PERSONNEL,

Respondents.

ORDER DENYING DEFAULT

On July 11, 2003, Grievant, Frank Lewis, filed a motion for default with this Grievance Board, stating his employer, the Department of Health and Human Resources ("HHR"), had defaulted at Level III. The underlying grievance deals with a request to be reallocated. (See footnote 1) A Level IV default hearing was held October 14, 2003, at the Grievance Board's Charleston Office. As the parties elected not to file proposed Findings of Fact and Conclusions of Law, this case became mature for decision on the day of the hearing. (See footnote 2)

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. Grievant is employed by HHR as a Health and Human Resources Specialist, Senior. On May 8, 2003, he filed a grievance asking to be reallocated to a Program Manager 1 or 2.

2. The Level III hearing was held on June 10, 2003. Due to a clerical error, the hearing was not on Lowell Basford's, the Assistant Director of Classification and Compensation for the Division of Personnel, calendar. Mr. Basford did not attend, and he was given the opportunity by the Grievance Evaluator, David Adkins, to submit a position statement five working days after the hearing.

3. Grievance Evaluator Adkins indicated this response would be due on June 17, 2003.

4. Grievance Evaluator Adkins received Mr. Basford's position statement on Thursday, June

19, 2003.

5. Friday, June 20, 2003, was a state holiday.

6. On Monday morning, June 23, 2003, Grievance Evaluator Adkins informed Grievant that the Division of Personnel was late in submitting the position statement, checked to see if Grievant got a copy, asked if Grievant needed an extension for his response, and to let him know if Grievant wanted to waive the rebuttal.

7. Grievant responded that afternoon, noted he had been out of the office, stated he had not received anything, and he would let Grievance Evaluator Adkins know the next day.

8. Having heard nothing from Grievant, Grievance Evaluator Adkins e-mailed Grievant on Tuesday afternoon, June 24, 2003, and told Grievant if did not have Mr.Basford's response by that evening to let him know, and he would have his Secretary fax him a copy.

9. That same afternoon Grievant asked Grievance Evaluator Adkins for a faxed copy.

10. The following Wednesday morning, June 25, 2003, Grievance Evaluator Adkins e-mailed Grievant to tell him the Division of Personnel had some trouble finding his fax number, and Grievant should now have a copy.

11. On Wednesday afternoon, June 25, 2003, Grievant e-mailed Grievance Evaluator Adkins with questions about where to send his response. Grievance Evaluator Akins responded within minutes with directions, and stated he would consider the record closed when Grievant submitted his rebuttal, and the decision would be issued in five working days. (See footnote 3)

12. Grievance Evaluator Adkins received Grievant's signed response at 4:16 p.m. on June 25, 2003.

13. In his submissions, Grievant was confused and believed Mr. Basford worked for HHR's Division of Personnel. He requested the position statement filed by HHR's Division of Personnel be removed from the record because it was untimely, that HHR's Division of Personnel be removed from the grievance, and he asked for default judgment against HHR because its Division of Personnel had failed to comply with the time frames established in W. Va. Code § 29-6A-4(b). 14. At no time did Grievant indicate he did not accept the time frames established through his frequent e-mails with Grievance Evaluator Adkins.

Discussion

W. Va. Code § 29-6A-4 sets forth the timelines to be followed at each level of the grievance procedure. The timelines for Level III require the chief administrator, or his or her designee, to hold a hearing within seven days 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 HHR 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. ofCorrections, 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). As Grievant did not appeal his Level III decision, if there is no default, the grievance process is completed.

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 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. 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's assertion of default is somewhat difficult to understand and is based on assumptions.

At Level III, he asserted a default occurred when Mr. Basford did not submit his position statement on time. This failure by the Division of Personnel does not result in a default, as HHR has no control over the Division of Personnel; it is a separate agency. Grievant could correctly request Grievance Evaluator Adkins not to consider the statement, but it was within Grievance Evaluator Adkins' discretion to decide to do so.

At Level IV, Grievant changed his argument, and he asserted a default occurred because the time in which to write the decision should have started on June 17, 2003, when Mr. Basford did not ask for an extension or submit his position statement. When Grievant became aware of the delay with the position statement, Grievant submitted his reply, and never said he wanted to change the time frames. Grievance Evaluator Adkins wrote Grievant daily, and Grievant responded. From Grievant's e-mail replies and writtenresponse to Mr. Basford's position statement, there is no way Grievance Evaluator Adkins would have been aware Grievant believed the time frame for writing the Level III decision started on June 17, 2003. Indeed, when Grievant alleged default at Level III, it was because the Division of Personnel's response was late, which is not a reason for default. Grievant did not make this default argument until he filed at Level IV.

Respondent contends there was no default, as the decision was issued in a timely manner. Grievance Evaluator Adkins received Grievant's proposals on Thursday, June 25, 2003. He issued his decision on July 2, 2003, within five working days. (See footnote 4) Prior to the receipt of Grievant's proposals, Grievance Evaluator Adkins had no inkling that Grievant believed the Division of Personnel's position statement should be thrown out.

Because Grievant never informed Grievance Evaluator Adkins of his beliefs, the time frames could not be changed. 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 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. The written decision was issued within five days of Grievance Evaluator Adkins' receipt of Grievant's rebuttal.

4. 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 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).

5. No default occurred in this case.

Accordingly, Grievant's request that a default be entered is **DENIED**, and this grievance is **DISMISSED** from the docket of this Grievance Board.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: November 24, 2003

Footnote: 1

Grievant was very clear at the Level IV hearing that he did not appeal the Level III decision.

Footnote: 2

Grievant represented himself, and Respondent was represented by Robert Miller, Esq., Assistant Attorney General.

Footnote: 3

Grievance Evaluator Adkins had stated at the Level III hearing that the record would be closed after he received the final submissions.

Footnote: 4

The date of receipt does not count.