THOMAS JOSH HORSTMAN,

Grievant,

v. **Docket No. 04-14-336D**

HAMPSHIRE COUNTY BOARD OF EDUCATION,

Respondent.

ORDER DENYING DEFAULT

On September 9, 2004, Grievant filed a request for relief by default with this Grievance Board, alleging a default occurred at level two. A hearing was conducted in Westover, West Virginia, on October 13, 2004, for the purpose of determining whether or not a default occurred. Grievant was represented by Harvey Bane of the West Virginia Education Association, and Respondent was represented by counsel, Norwood Bentley. This issue became mature for consideration at the conclusion of the hearing.

The following findings of fact are made based upon a preponderance of the evidence adduced at the level four hearing.

Findings of Fact

1. At the onset of the 2004-2005 school year, Grievant was employed by Respondent as a substitute teacher.

2. In August of 2004, Grievant applied for a position for which he was not selected.

3. On August 26, 2004, Grievant sent a letter to Superintendent David Friend, stating that he was “submitting a grievance” regarding his non-selection for the position, but he did not file a grievance form. 4. On August 30, 2004, Grievant submitted a grievance form to Superintendent Friend's office. Grievant left the “Level I” section blank, but signed and dated the “Level II” section. He also wrote on the form “I am filing at Level II.”

5. Mr. Friend wrote to Grievant on August 30, 2004, upon receipt of the grievance form. He

advised Grievant that he needed to have a conference with Paula O'Brien, Assistant Superintendent and Secondary Curriculum Director, and then file the level one grievance with her.

6. Grievant phoned Mrs. O'Brien on Friday, September 3, 2004, after he received Mr. Friend's letter, but she was not in the office.

7. Monday, September 6 was the Labor Day holiday, so Mrs. O'Brien returned Grievant's call on September 7.

8. Mr. Friend had asked Mrs. O'Brien to explain the grievance procedure to Grievant and the necessity of filing at level one. During the September 7 conversation, Grievant refused to discuss the issue, stating that his representative had advised him to proceed at level two. Grievant advised her that he only called because Mr. Friend had told him to call her to “see if she had anything for him,” i.e. a position. When Mrs. O'Brien instructed him regarding the grievance process, Grievant merely stated that she should have placed him in the position at issue.

9. A substitute teacher's immediate supervisor is normally the principal of the school where they are teaching. Grievant was not teaching in any particular school at the time he filed the grievance.

10. Substitute teachers' evaluations are turned in to Mrs. O'Brien by the principals, and she directs the principals in all issues related to substitute teachers. 11. Grievant filed for relief by default on September 9, 2004, because a level two hearing had not been held within the statutory time limit.

12. By letter dated September 10, 2004, Respondent's counsel advised Grievant that, per Mrs. O'Brien, his grievance was “denied at Level II.”

Discussion

"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). Because Grievant is claiming he prevailed by default under the statute, he bears the burden of establishing such default by a preponderance of the evidence. Friend v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-346D (Nov. 25, 1998).

In the instant case, the outcome of the default issue depends largely upon credibility

determinations. Grievant gave a totally different version of events from Mrs. O'Brien, specifically regarding their telephone discussion, when it occurred, and what was said. Initially, Grievant testified that he followed Mr. Friend's directive, and phoned Mrs. O'Brien to request a conference. He stated that her response was to tell him that he was “stupid” and “ignorant” for filing the grievance in the wrong place, she would never place him in any position in the county, and she would not meet with him to discuss the grievance.

Later, under cross examination, Grievant testified that, after speaking with Mrs. O'Brien, he discussed the matter with his representative, who instructed him to go forward with his grievance. He stated that he then filed the grievance form on August 30. However, Grievant was obviously confused, because Mr. Friend's August 30 letter,instructing Grievant that he needed to have a conference with Mrs. O'Brien and file at level one, was issued in *response* to the grievance filed on August 30. Clearly, the grievance was filed prior to Grievant's discussion with Mrs. O'Brien.

Grievant was also adamant that he called Mrs. O'Brien on September 1, spoke with her that day, and that was their only discussion. This directly conflicts with Mrs. O'Brien's version of events, who testified that she noted on her calendar that Grievant had called her on September 3, she was not in the office, and she returned his call after the Labor Day holiday on September 7. As to their conversation, Mrs. O'Brien's version is also quite different, in that she testified that Grievant refused to discuss the grievance and only wanted to know if she had a position to offer him. Mrs. O'Brien adamantly denied calling Grievant stupid or ignorant.

In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Res., Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Res., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Res./Huntington State Hosp., Docket No. 93- HHR-050 (Feb. 4, 1993). "The fact that [some of] this testimony is offered in written form does not alter this responsibility." Browning v. Mingo County Bd. of Educ., Docket No. 96- 29-154 (Sept. 30, 1996).

The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3)reputation for honesty; 4)

attitude toward the action; and 5) admission of untruthfulness. Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. (See footnote 1) See Holmes v. Bd. of Directors/W. Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.

Grievant's testimony is completely without credibility. He even contradicted *himself* during the level four hearing. After first stating that he called Mrs. O'Brien to request a level two conference, which she refused, he later testified that he called her because he “had a question about the letter” (although never stating what the question was), and that he figured he would give her the opportunity to offer him a settlement. Indeed, Grievant's second version of events is more consistent with Mrs. O'Brien's version, indicating Grievant's refusal to discuss the grievance and his insistence that he should receive a position. Accordingly, the undersigned finds Mrs. O'Brien's version to be the truthful one, so there was no refusal of a level one conference. Additionally, since she kept notes of the events in this grievance, Mrs. O'Brien's timeline is also found to be the correct one, with their phone conversation taking place on September 7.

Grievant contends that he had the right to begin this grievance at level two, because he did not have an immediate supervisor. West Virginia Code § 18-29-3(c) allows a grievant to file “at the level vested with the authority to grant the requested relief,” but only“if the grievance evaluator at that level agrees in writing thereto.” That obviously did not occur in this case, and Mr. Friend gave Grievant specific instructions regarding how to proceed at level one with Mrs. O'Brien. Although not Grievant's “immediate” supervisor, Mrs. O'Brien would be a logical administrator to deal with the grievance of an unplaced substitute teacher, as she effectively functions as their second level supervisor. Moreover, as the person who makes decisions regarding placement of substitute teachers, she would have been the decision-maker who could resolve this grievance at the lowest possible level.

Accordingly, the undersigned finds that no default occurred in this case. West Virginia Code § 18-29-4(a) provides that a grievant's immediate supervisor must respond to the grievance within ten days of the informal conference. In the instant case, Grievant refused the informal conference, despite Mrs. O'Brien's efforts and Mr. Friend's instructions. This Grievance Board has consistently ruled that 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 Res., Docket No. 99-HHR-326D (Oct. 14, 1999). Therefore, it would be highly improper for Grievant to be granted relief by default, when he refused to proceed at level one as instructed, and any failure to respond as he desired only occurred because of his refusal to comply with the statutory requirements of the grievance process. Moreover, even if the September 7 phone conversation were viewed as an informal conference, Grievant's filing for default two days later was clearly premature, as the ten-day response period had not expired. Consistent with the foregoing, the following conclusions of law are appropriate.

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. An informal conference must be requested within fifteen days of the grievable event, and the grievant's immediate supervisor must respond to the grievance within ten days of the informal conference. West Virginia Code § 18-29-4(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).
4. Grievant has failed to prove by a preponderance of the evidence that a default occurred.

Accordingly, Grievant's request for default is **DENIED**, and this matter is **REMANDED** to level two for further proceedings at that level. Respondent is ordered to hold a level two hearing within five days of receipt of this order, or within such time as is mutually agreed by the parties, in writing. This matter is hereby **DISMISSED** from the docket of the Grievance Board.

Date: October 27, 2004 _____ **DENISE M. SPATAFORE**

Administrative Law Judge

Footnote: 1

The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984).