TINA PULLEN,

Grievant,

v. **DOCKET NO. 04-CORR-323D**

DIVISION OF CORRECTIONS/

MOUNT OLIVE CORRECTIONAL COMPLEX, **Respondent.**

ORDER DENYING DEFAULT

On July 27, 2004, Tina Pullen filed a grievance challenging her suspension. On or about August 26, 2004, Grievant asserted a default had occurred at level one. Respondent forwarded Grievant's default claim to the Grievance Board (See footnote 1), and a level four hearing on the question of whether a default occurred was held at the Grievance Board's Beckley Office on November 16, 2004.

Grievant was represented by Zach Hill. Respondent was represented by counsel, John Boothroyd. The matter became mature for decision at the close of the hearing.

Based on a preponderance of the evidence adduced at the hearing, I find the following material facts have been proven:

FINDINGS OF FACT

1. Grievant was suspended pending an investigation into misconduct, and on July 27, 2004 filed a grievance at level one challenging the suspension. Respondent made no response to this grievance.

2. On July 29, 2004, Grievant returned to the facility to meet with Deputy Warden Michael Coleman, Associate Warden William Vest, and Terry Arthur to discuss a draft of a letter terminating Grievant's employment. At that meeting, Grievant had no response, so the letter was finalized and given to Grievant.

3. Mr. Coleman explained to Grievant that she could file a grievance over her termination directly at level four, and asked Grievant if she wanted to take her suspension grievance with her and

combine it with any grievance she would be filing on her dismissal.

4. Grievant took her original of the suspension grievance filing with her when she left.

DISCUSSION

"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). When a grievant asserts that her employer is in default in accordance with W. Va. Code § 29-6A-3(a)(2), the grievant must establish such default by a preponderance of the evidence. *See* W. Va. Code § 29-6A-3(a)(2). *Board, et al. v. WVDHHR / Lakin Hospital*, Docket No. 99-HHR- 329D (Sep. 24, 1999). Grievant asserts that a default occurred at level one because Respondent made no response whatsoever to her grievance filed July 27, 2004. Respondent agrees it made no response, but asserts it reasonably believed Grievant had withdrawn the grievance because she took the original papers with her from the meeting regarding her termination. Grievant rebuts this argument by pointing out that W. Va. Code 29-6A-3(d) requires a grievance to be withdrawn in writing. That section of the grievance procedure states, “An employee may withdraw a grievance at any time by notice, in writing, to the level where the grievance is then current.”

Both positions have merit, but I find it was reasonable for Respondent to assume Grievant had withdrawn her grievance when she took the originals of her grievance filing with her from the meeting. Respondent has good cause to believe that the issue would be combined with a grievance regarding Grievant's dismissal, especially given that the relief requested in the suspension grievance -- reinstatement to her position -- could not be granted due to the dismissal. Grievant's actions in taking her grievance filing with her without making it clear she wished to proceed with that claim contributed to Respondent's failure to timely respond.

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). Further, Respondent's failure to act was excusable neglect, one of the statutory exceptions to the procedural time limits. "'Excusable neglect seems to require a demonstration of good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance with the time frame specific in the rules. Absent a showing along these lines, relief will be denied.' *Perdue v. Hess*, 199 W. Va. 299, 484 S.E.2d 182 (1997)(quoting *Bailey v. Workman's Comp. Comm'r*, 170 W. Va. 771, 296 S.E.2d 901 (1982) and quoting 4A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1165 (1969))." *Woody v. Div. of Rehabilitation Services*, Docket No. 02- RS-349D (Dec. 6, 2002); *Rosewell v. Dep't of Envtl. Protection/Div. of Water Resources,* Docket No. 01-DEP-506D (Sep. 27, 2002). Respondent made a good-faith reliance on Grievant's actions as demonstrating her desire to withdraw the suspension grievance and proceed on a grievance challenging her dismissal.

The following Conclusions of Law support this decision:

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). When a grievant asserts that her employer is in default in accordance with W. Va. Code § 29-6A-3(a)(2), the grievant must establish such default by a preponderance of the evidence. *See* W. Va. Code § 29-6A-3(a)(2). *Board, et al. v. WVDHHR / Lakin Hospital*, Docket No. 99-HHR-329D (Sep. 24, 1999).

2. 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). *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)

3. Grievant's actions in making an apparent withdrawal of her grievance was the cause of Respondent's failure to respond in a timely manner.

4. "'Excusable neglect seems to require a demonstration of good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance with the time frame specific in the rules. Absent a showing along these lines, relief will be denied.' *Perdue v. Hess*, 199 W. Va. 299, 484 S.E.2d 182 (1997)(quoting *Bailey v. Workman's Comp. Comm'r*, 170 W. Va. 771, 296 S.E.2d 901 (1982) and quoting 4A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1165 (1969))." *Woody v. Div. of Rehab. Services*, Docket No. 02-RS-349D (Dec. 6, 2002); *Rosewell v. Dep't of Envtl. Protection/Div. of Water Res.,* Docket No. 01-DEP-506D (Sep. 27, 2002).

5. Respondent's good-faith assumption that the grievance had been withdrawn, based on Grievant's actions, was a reasonable basis for non-compliance with the grievance procedure, and its failure to respond to the suspension grievance was excusable neglect.

For the foregoing reasons, Grievant's request for relief by default is **DENIED**. This matter is **REMANDED** to level one of the Grievance Procedure. This matter is dismissed from the docket of the Grievance Board. As Grievant has clarified by this default claim that she does not consider the grievance withdrawn, Respondent is **ORDERED** to schedule a level one conference to be held within three days of receipt of this Order. Alternatively, Grievant may request that this claim be consolidated with her dismissal grievance now pending at level four. (See footnote 2)

Date: December 15, 2004 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Respondent mistakenly stated to Grievant that the grievance procedure required her to file her default claim with the Grievance Board. In fact, the claim was properly filed, and it is incumbent on the employer to make a request for a level four hearing on the claim if it feels the claim should be challenged. A respondent always has the option of granting the default if the grievant's claim is valid. See W. Va. Code § 29-6A-3(a)(2).

Footnote: 2

"Grievances may be consolidated at any level by agreement of all parties." W. Va. Code § 29-6A-3(e).