DANA BOWEN, II,

Grievant,

v. **Docket No. 05-DOH-133D**

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

ORDER DENYING DEFAULT

Dana Bowen ("Grievant") filed a claim of default on April 22, 2005, with his employer, the Division of Highways ("DOH"). Pursuant to Respondent's request to this Grievance Board for a hearing on that default claim, a hearing was conducted in Elkins, West Virginia, on July 19, 2005. Grievant represented himself, and DOH was represented by counsel, Barbara Baxter. The issue of whether a default occurred at level one became mature for consideration at the conclusion of that hearing.

The following material facts have been proven by a preponderance of the evidence.

Findings of Fact

1. Grievant is employed by DOH in District 7.

2. In April of 2005, Grievant was experiencing personality conflicts with his supervisor, Rodney Myers, District 7 Construction Engineer. Also at that time, for reasons unstated in the record, he was temporarily assisting with a project in District 8.

3. On Monday, April 18, 2005, Grievant came to Mr. Myers office, and a discussion ensued regarding previous conversations the two had about temporarily transferring Grievant to another district, which Grievant refused. During this discussion,Grievant handed Mr. Myers a grievance form, which alleged "harassment, hostile working environment, retaliation."

4. When he handed Mr. Myers the grievance form, Grievant requested that an informal conference be held and that he be given at least 48 hours notice of when the conference would be

conducted.

5. Mr. Myers informed Grievant that he was unsure of the required timeframe for holding an informal conference. He also advised Grievant that he was going to be out of town at a conference for the next three days, until Thursday afternoon, and asked Grievant if they could schedule the conference when he returned. Grievant agreed and expressed no objection to this arrangement.

6. Mr. Myers took contemporaneous notes of his April 18 meeting with Grievant, and recorded the events of that morning on his daily calendar.

7. On Friday, April 22, Grievant went to Mr. Myers' office, where another discussion about his potential transfer ensued. Grievant handed Mr. Myers a grievance form claiming a default, stating that Mr. Myers had “missed the 3-day time limit” by not conducting the informal conference. When Mr. Myers reminded him of their discussion and agreement on Monday, Grievant denied agreeing to deal with the issue when Mr. Myers returned from his trip.

8. When Grievant claimed a default had occurred, Mr. Myers offered to conduct the conference that day, on April 22, 2005. Grievant refused, and the conference was scheduled for the following Monday. 9. On Monday, April 25, 2005, a conference was held regarding the grievance. In attendance were Grievant, his representative, Mr. Myers, and another unidentified individual. (See footnote 1)

Discussion

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 DOH 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). W. Va. Code § 29-6A-4 sets forth the time lines to be followed at each level of the grievance procedure. W. Va. Code § 29-6A-4(a) identifies the required response at level one:

> Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant. At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance. If a grievance alleges discrimination or retaliation by the immediate supervisor of the grievant, the level one filing may be waived by the grievant and the grievance may be initiated at level two with the administrator or his or her designee, within the time limits set forth in this subsection for filing a grievance at level one. A meeting may be held to discuss the issues in dispute, but the meeting is not required.

In the instant case, Mr. Myers gave undisputed testimony that Grievant agreed to schedule the informal conference when Mr. Myers returned to the office on Friday, which would obviously mean that the conference was not going to be held within the statutory three-day time limit. Although Grievant has continued to insist that a default occurred, and that Mr. Myers should have been aware of the timeframe and made sure the conference occurred within three days, he did not dispute Mr. Myers' testimony regarding their agreement.

Under these circumstances, it must be determined whether Grievant waived his right to have the conference held within three days of filing his grievance. The concept of an actual waiver of one's established rights implies a voluntary act. Smith v. Bell, 129 W. Va. 749, 760, 41 S.E.2d 695, 700 (1947). "'A waiver of legal rights will not be implied except upon clear and unmistakable proof of an intention to waive such rights.' . . . Furthermore,'the burden of proof to establish waiver is on the party claiming the benefit of such waiver, and is never presumed.'" (Citations omitted). Potesta v. U.S. Fidelity & Guar. Co., 202 W. Va. 308, 315, 504 S.E.2d 135, 142 (1998). It has been held by this Grievance Board that timelines may be extended by the actions of the grievant and by the agreements of the parties, such as rescheduling of hearing dates beyond the statutory timeframe. Gerencir v. Kanawha County Bd. of Educ., Docket No. 01-20-500D (Nov. 30, 2001); Mullins v.

Kanawha County Bd. of Educ., Docket No. 01-20-038D (Apr. 10, 2001). Further, “[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. 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 bodyto 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).

The undersigned finds Mr. Myers' testimony to be credible, especially in light of the contemporaneous notes regarding the agreement, along with Grievant's failure to dispute that he did, in fact, agree that the matter could be dealt with at a later time. Moreover, it is quite atrocious for Grievant to attempt to win his grievance by default by later claiming he did not make the agreement. Mr. Myers justifiably relied upon Grievant's good word, so Grievant is prohibited from claiming default under these circumstances.

The following conclusions of law support this decision.

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, injury, excusable neglect, unavoidable cause or fraud, the grievant shall prevail by default. W. Va. Code § 29-6A-3(a)(2).

2. 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).

3. Pursuant to W. Va. Code § 29-6A-4(a), at the request of either party, an informal conference is to be held within three days of receipt of a written grievance at level one.

4. The statutory time limits may be extended by the actions of the grievant and by the agreements of the parties. Bennett v. Randolph County Bd. of Educ., Docket No. 03-42-071D (May 12, 2003); Gerencir v. Kanawha County Bd. of Educ., Docket No.01-20- 500D (Nov. 30, 2001); Mullins v. Kanawha County Bd. of Educ., Docket No. 01-20- 038D (Apr. 10, 2001).

5. Because he agreed that an informal conference could be scheduled beyond the statutory

three-day time limit, Grievant is not entitled to relief by default.

Accordingly, Grievant's request for default is **DENIED**, and this matter is hereby **REMANDED** to level two for further proceedings on the merits, with a level two conference being conducted within **ten working days** of the date of this Order, unless otherwise agreed to in writing by the parties.

Date: July 28, 2005

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DENISE M. SPATAFORE

Administrative Law Judge

Footnote: 1

Mr. Myers testified that, due to Grievant's denial of their previous agreement, he felt it was necessary to have a witness present for the informal conference.