JOHN ARBOGAST,

Grievant,

v. Docket No. 05-DOH-288D

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

ORDER DENYING DEFAULT

John Arbogast ("Grievant"), employed by the Division of Highways ("DOH") as a Resurfacing Coordinator, filed a level one grievance on May 27, 2005, alleging that he is no longer allowed to drive a state vehicle to and from his home, as is permitted in a memorandum issued by Fred VanKirk on February 11, 2004. For relief, Grievant requested his use of a state vehicle be reinstated, or a 10% pay increase. Grievant's immediate supervisor lacked authority to grant the relief at level one. The grievance was denied at level two, and appeal was made to level three on June 22, 2005.

DOH counsel Carrie Dysart requested a continuance of the level three hearing scheduled for July 25, 2005, and Grievant agreed to "extend this time until the 31st. [sic] of August 2005." After some discussion between the parties, Ms. Dysart requested, by letter dated July 15, 2005, that the Grievance Board schedule a mediation. By memorandum dated August 12, 2005, Grievant notified the level three hearing examiner that DOH was in default. A hearing on the default claim was filed with the Grievance Boardby DOH, and a hearing was conducted in the Elkins office on September 20, 2005. Grievant represented himself, and DOH counsel Robert Miller participated by telephone. The matter became mature for decision at the close of the hearing when both parties waived the right to submit proposed findings of fact and conclusions of law.

The following facts are undisputed.

Findings of Fact

1. Grievant has been employed by DOH as a Resurfacing Coordinator in District 8 at all times pertinent to this grievance.

2. Grievant filed a level three appeal in this grievance on June 24, 2005.

3. DOH requested a continuance of the level three hearing scheduled for July 25, 2005. Grievant agreed to an extension until August 31, 2005.

4. The parties then agreed to mediate the grievance, and the case was placed on the Grievance Board's mediation docket for scheduling.

5. On August 2, 2005, DOH counsel Barbara Baxter notified the Grievance Board by e-mail that mediation would not be useful in this case.

6. Grievant filed a claim for default on August 12, 2005.

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). The burden of proof is upon the grievant to prove by a preponderance of the evidence that a default occurred, *i.e.*, the grievance evaluator required to respond to a grievance at a specified level failed tomake a required response in the time limits required in this article. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002). At level three, W. Va. Code § 29-6A-4(c) requires the level three evaluator to hold a hearing “within seven days of receiving the appeal.” In counting the time allowed for an action to be accomplished under the state employee grievance procedure, W. Va. Code § 29-6A-2(c) provides that "days" means working days exclusive of Saturday, Sunday or official holidays. In computing the time period in which an act is to be done, the day on which the appeal was submitted is excluded. See W. Va. Code § 2-2-3; Brand v. Swindler, 68 W. Va. 571, 60 S.E.2d 362 (1911). See also W. Va. R. Civ. P. 6(a).

Grievant argues that if the seven days within which to hold a hearing began on July 15, 2005, the date Ms. Dysart requested the continuance, a hearing should have been scheduled by July 26. If the time period started on July 25, the date the hearing was first scheduled, it should have been scheduled by August 3, 2005. Grievant asserts that DOH never had any intention of scheduling a mediation, and that under those circumstances, the extension to

August 31 was voided. DOH argues that Grievant had agreed to an extension until August 31, 2005, precluding a default before that time.

The documentation indicates that DOH forwarded a request for mediation to the Grievance Board on July 15, 2005, the same day Ms. Dysart requested the continuance for the level three hearing. Apparently, after a change of counsel, it was determined that mediation would not be helpful in this instance. Grievant's concern regarding the change in position is understandable; however, there is no evidence that DOH acted in bad faith. In fact, he was assured by the level three hearing evaluator that his hearing would be conducted within the deadline he identified. 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). 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). Because Grievant agreed to a delay to a specific date of his own determination, with no qualifications or limitations, no default occurred in this case. DOH had until August 31, 2005, to conduct a level three hearing, and was prepared to do so. Grievant has failed to prove a default occurred at level three, and is not entitled to relief at this time. 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).

2. The burden of proof is upon the grievant to prove by a preponderance of the evidence that a default occurred, *i.e.*, the grievance evaluator required to respond to a grievance at a specified level failed to make a required response in the time limits requiredin this article. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002). 3. At

level three, W. Va. Code § 29-6A-4(c) requires the level three evaluator to hold a hearing "within seven days of receiving the appeal." 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). Accordingly, Grievant's request for relief by default is hereby DENIED.

This matter is hereby REMANDED to level three for a hearing on the merits of the grievance, and the hearing shall be held within 10 WORKING DAYS of receipt of this Order, unless otherwise agreed in writing by the parties.

DATE: OCTOBER 13, 2005

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE