**ROBERT SMITH,**

**Grievant,**

**v.** **Docket No. 05-DOH-094D**

**DIVISION OF HIGHWAYS,**

**Respondent.**

## ORDER DENYING DEFAULT

Robert Smith ("Grievant") filed a claim of default with this Grievance Board on March 22, 2005, alleging a default occurred at level three of the grievance procedure. A hearing was held in Westover, West Virginia, on June 27, 2005, for the purpose of determining whether the alleged default occurred. Grievant represented himself, and Respondent was represented by counsel, Barbara Baxter. This issue became mature for consideration at the conclusion of the default hearing.

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

## Findings of Fact

1. Grievant filed a grievance with his immediate supervisor on December 16, 2004. The grievance proceeded through levels one and two uneventfully.

2. Grievant filed a level three appeal on March 9, 2005, which was received in the Office of the Hearing Examiner on Friday, March 11, 2005.

3. Jacque Beaver, a paralegal in the hearing examiner's office, contacted Grievant by telephone on Tuesday, March 15, 2005, regarding scheduling his hearing. Grievant refused to waive the timelines for holding a level three hearing, so it was agreed that his hearing would be held telephonically. 4. On March 16, 2005, a notice was sent to all parties, setting the level three telephonic hearing for March 18, 2005, at 11:00 a.m.

5. On Friday, March 18, 2005, at 8:23 a.m., an email was sent by Ms. Beaver to Grievant, stating that the hearing scheduled for that day would not be held, and it had been rescheduled for

Monday, March 21, 2005, at 2:00 p.m. Ms. Beaver also spoke to Grievant by telephone on March 18, explaining to him that Respondent's attorney was sick, and he agreed that the hearing could be held the following Monday.

6. By email on March 18, 2005, at 3:32 p.m., Ms. Beaver advised the parties that the March 21, 2005, hearing would be held at 9:00 a.m., rather than at 2:00 p.m.

7. Grievant left work at 12:00 noon on March 18, 2005, so he did not receive the afternoon email until the following Monday morning.

8. By email on March 21, 2005, at 8:46 a.m., Ms. Beaver advised the parties that the hearing would have to be continued again. Ms. Beaver and Grievant spoke by phone also, and Ms. Beaver explained that both the attorney for Respondent and its chief witness, Jeff Black, were sick and could not attend the hearing. Grievant expressed his desire to proceed without Mr. Black as a witness. During this conversation, Ms. Beaver asked Grievant if he would agree to hold the hearing the following day, March 22, 2005.

9. After consultation with counsel, Grievant phoned Ms. Beaver on Tuesday, March 22, 2005, and advised her that he was refusing to hold the hearing that day, and he was claiming default. A default notice was filed with the Grievance Board on that date.

## 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 thisarticle, 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 to make 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).

Excluding weekends, March 22, 2005, was the seventh working day after Grievant's level three appeal was received on March 11, 2005. Ms. Beaver stated, with no dispute from Grievant, that she offered to hold the hearing on March 22, and he refused. If the hearing had been held on March 22, Respondent would have conducted the hearing within the required timeframe. The only reason the hearing did not occur on that day was due to Grievant's refusal, obviously brought on by his desire to pursue a default claim. 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 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).

Accordingly, the undersigned finds that no default occurred in this case. Respondent attempted to hold a hearing on the seventh working day after it received the level three appeal, complying with its statutory obligation. Grievant was the cause of the failure to conduct a hearing within the appropriate timeframe. (See footnote 1) Therefore, he is not entitled to relief.

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 agrievance at a specified level failed to make 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).

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 the date of this Order, unless otherwise agreed in writing by the parties.

**Date: July 1, 2005**

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**DENISE M. SPATAFORE**

**Administrative Law Judge**

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*Footnote: 1*

*Grievant admitted at the level four hearing that he had not even calculated how many days Respondent had to hold the hearing--he was merely upset about the matter being rescheduled.*