THE WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

DALLAS BRANCH, JR.,

Grievant,

v. **Docket No. 06-HE-206D**

SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

WEST VIRGINIA UNIVERSITY,

Respondent.

D E C I S I O N

Dr. Dallas Branch. Jr. ("Grievant"), employed by West Virginia University ("WVU") as an Associate Professor of Physical Education and Sports Studies, filed a level one grievance with Dr. Lynn Housner, Associate Dean, on April 24, 2006. Grievant indicated on the grievance form that he wished to waive consideration at level one, and a level two conference was conducted by Dean Dana D. Brooks on May 1, 2006. On June 6, 2006, Grievant filed a Notice of Default. Pursuant to *W. Va. Code* § 29-6A-3, WVU requested a hearing on the default issue. A hearing on the default claim was conducted in the Grievance Board's Westover office on August 31, 2006. Grievant was represented by Alex J. Shook, Esq., of Hamstead, Williams & Shook, PLLC, and WVU was represented by Assistant Attorney General Samuel R. Spatafore. The matter became mature for decision on October 2, 2006, the due date for submission of proposed findings of fact and conclusions of law. (See footnote 1)

The following facts have been derived from a preponderance of the credible evidence made part of the record at level four.

Findings of Fact

___1. Grievant has been employed by WVU as an Associate Professor at all times pertinent to this grievance.

2. Grievant filed a level one grievance form with his immediate supervisor on April 24, 2006. Grievant indicated on the form that he wished to waive processing at level one.

3. A level two grievance conference was conducted by Dean Brooks on May 1, 2006, and a decision denying the grievance was issued on May 4, 2006. The level two decision advised Grievant of his appeal rights, stating that any appeal was to be filed with President David C. Hardesty, Jr., and delivered to Room 105, Stewart Hall.

4. On May 11, 2006, Grievant delivered his level three appeal to Stewart Hall during the lunch hour. On finding no one in Room 105, Grievant left the appeal at the office of C.B. Wilson, Associate Provost for Academic Personnel, in Room 210 of Stewart Hall. This action was based on a mistaken assumption that Dr. Wilson acted as President Hardesty's designee in the grievance process.

5. The level three appeal was not forwarded to the President's office.

6. On June 6, 2006, Grievant filed a Notice of Default with WVU counsel Mary Roberta Brandt. Grievant asserted that his immediate supervisor failed to issue a written decision at level one within six days, and that a level three hearing had not been scheduled within seven days of his request for a hearing filed on May 11, 2006.

Issues and Arguments

___Grievant argues that WVU defaulted at level one when it failed to issue a decision, and again when no hearing was scheduled at level three. WVU asserts that no decisionwas required at level one because Grievant had requested that consideration at that level be waived. Addressing the level three matter, WVU argues that again there was no default because the grievance was not properly filed with President Hardesty, pursuant to the directions included in the level two decision.___

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).

Generally*, W. Va. Code* § 29-6A-3(a) provides that a 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. Grievant's claims that WVU failed to meet statutory time lines in this case, and therefore defaulted at levels one and three, are without merit.

Level one

First, Grievant requested the level one review be waived. Grievant now argues that he is entitled to a level one decision notwithstanding his request that the process be waived at that level. This argument is illogical. The request to waive processing at a given level includes both the conference or hearing and the decision. It would be irresponsible toissue a decision without any evidence upon which to base the conclusions. It is not clear what led to Grievant's confusion; however, “[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 body to 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). Therefore, Grievant's claim that a default occurred at level one is without merit.

Level three

By his own admission, Grievant did not file the level three appeal at the correct location. Grievant further concedes that he assumed Provost Wilson was President Hardesty's designee in the grievance procedure. That assumption was incorrect. There was no evidence as to what happened to the grievance, but clearly, it did not reach President Hardesty's office. Again, Grievant must bear responsibility for his actions, which were contrary to the directions he had been provided for filing at level three. It is not appropriate to grant relief to a party who invites error.

Furthermore, Grievant did not timely pursue either claimed default. Both were raised in the June 12, 2006, letter for the first time, approximately six weeks after the level two conference, and a month after leaving the level three appeal in the wrong office. Grievant argues there is no set time period to claim a default. While it is true that there is no statutory time frame for filing a claim for default, the Grievant Board has consistentlyheld that an employee is allowed to pursue a default claim only if he raises it as soon as he becomes aware of the default. *Martin v. Randolph County Bd. of Educ*., 195

W. Va. 297, 465 S.E.2d 399 (1995); *Hanlon v. Logan County Bd. of Educ*., 201 W. Va. 305, 496 S.E.2d 447 (1997). Therefore, the pursuit of this default claim is untimely.

In addition to the foregoing findings of fact and discussion, it is appropriate to make the following formal conclusions of law.

Conclusions of Law

1. 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).

2. *W. Va. Code* § 29-6A-3(a) provides that a 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.

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. *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 itsimmediate 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 body to 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).

4. An employee is allowed to pursue a default claim only if he raises it as soon as he becomes aware of the default. *Martin v. Randolph County Bd. of Educ*., 195 W. Va. 297, 465 S.E.2d 399 (1995); *Hanlon v. Logan County Bd. of Educ*., 201 W. Va. 305, 496 S.E.2d 447 (1997).

5. Grievant failed to timely raise the default claim or prove that a default occurred at level one or level three.

Accordingly, the claim for default is hereby **DENIED**, and the grievance REMANDED to level three for hearing.

DATE: OCTOBER 12, 2006

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SUE KELLER

SENIOR ADMINISTRATIVE LAW JUDGE

Footnote: 1

Grievant elected not to file proposals.