THE WEST VIRGINIA PUBLIC EMPLOYEES

GRIEVANCE BOARD

HEIMO RIEDEL,

Grievant,

v. **Docket No. 07-HE-093D**

WEST VIRGINIA UNIVERSITY,

Respondent.

ORDER DENYING DEFAULT AND MOTION TO DISMISS

Heimo Riedel, Grievant, filed a claim of default against his employer, West Virginia University ("WVU"), on March 20, 2007, alleging a default occurred at Level III of the grievance process because he did not receive reasonable notice of the hearing date. The underlying grievance deals with the non-renewal of an assistant's contract.

The parties elected to submit this default issue on proposed findings of fact and conclusions of law and attached documents. Grievant represented himself, and WVU was represented by Kristi McWhirter, Assistant Attorney General. This case became mature for decision on May 1, 2007, the date of Grievant's submission of his proposed findings of fact and conclusions of law. A copy of the hearing transcripts was received on June 15, 2007.

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

Findings of Fact

1. Grievant was employed by WVU as a tenured Professor in the Department of Biochemistry and Molecular Pharmacology in July of 2003. Respondent. Exh. 1 & 2.

2. Grievant filed this grievance on February 8, 2007, and it was denied at Levels I and II. 3. Grievant faxed his Level III appeal to President David Hardesty's office on Friday, March 9, 2007, in the afternoon. (See footnote 1) Res. Exh. 4.

4. A Level III hearing was scheduled for Monday, March 19, 2007, at 9:00 a.m. Res. Exh. 4.

5. By memorandum dated Wednesday, March 15, 2007, Grievant was informed of this hearing by regular U.S. mail and by interdepartmental mail.

6. Grievant was also informed of this hearing by email sent on March 16, 2007. Several other employees were also sent their notice by email. Respondent. Exh. 4.

7. Other individuals, who were to attend the hearing, received their notices. Trans. Level II hearing.

8. The Grievance Evaluator and Beverly Kerr, Associate General Counsel, were at the hearing site at the appointed time. Dr. Prescott was available to testify. Trans. Level II hearing.

9. When Grievant did not appear at the hearing, Ms. Kerr asked Angela Lemmon, Administrative Secretary, to call Grievant's office, but received no answer. She also asked Carol Murray, Administrative Assistant Senior, to call Grievant at home. Ms. Murray did not reach him, but left Grievant a message at 9:27 a.m. asking Grievant to inform her if he planned to attend the hearing. By 1:55 p.m. she had not received any response from Grievant. Res. Exh. 5. 10. Since Grievant did not appear at this scheduled Level III hearing, WVU decided to schedule another hearing for March 20, 2007. Grievant was sent this notice by e-mail, fax, U.S. mail, and a notice posted on Grievant's door around noon on March 19, 2007. Additionally, a message was left on Grievant's voice mail and with his wife. Res. Exh. 6.

11. Grievant noted he received notice of the hearing at least by 5:00 p.m. on March 19, 2007. On March 19, 2007, at 8:51 p.m., Grievant e-mailed Angie Eaglen, Administrative Assistant, Senior, and stated, "I have not received reasonable notice to allow me to schedule the necessary steps to attend and will follow up with the President's office with more detail soon." Grievant did not ask for a continuance. Res. Exh. 8.

12. On March 20, 2007, the Grievance Evaluator and Ms. Kerr attended the scheduled hearing at the appointed time. Grievant did not appear. Ms. Kerr filed a Motion to Dismiss for failure to pursue, and this was subsequently granted.

13. On March 20, 2007, at 3:07 p.m., Grievant filed a claim of default at Level III with WVU and

the Grievance Board fax. In his letter addressed to President Hardesty, Grievant noted he received the notice for the March 20, 2007 hearing on March 19, 2007, at least by the afternoon, but this was not reasonable notice, and since it was too late to schedule his grievance hearing, he was filing a claim for default. Res. Exh. 9.

Discussion

In a default grievance, 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 moreconvincing 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 Corr., 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 WVU 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, supra; Williamson, supra.

W. Va. Code § 29-6A-3(a) provides, in pertinent part:

> 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. Within five days of the receipt of a written notice of the default, the employer may request a hearing before a level four hearing examiner for the purpose of showing that the remedy received by the prevailing grievant is contrary to law or clearly wrong. In making a determination regarding the remedy, the hearing examiner shall presume the employee prevailed on the merits of the grievance and shall determine whether the remedy is contrary to law or clearly wrong in light of the presumption. If the examiner finds that the remedy is contrary to law, or clearly wrong, the examiner may modify the remedy to be granted to comply with the law and to make the grievant whole.

(Emphasis added).

The first question to address is whether WVU defaulted. W. Va. Code § 29-6A-4 sets forth the

timelines to be followed at each level of the grievance procedure. The timelines for Level III require the chief administrator, or his or her designee, to hold ahearing within seven days of receiving the appeal, and to issue a written decision affirming, modifying or reversing the Level II decision within five days of the hearing.

Grievant asserts a default occurred because he did not receive notice of the hearing. Once Grievant faxed his appeal on March 9, 2007, Respondent was required to meet the statutory timelines. 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. Smith v. Dep't of Highways, Docket No. 05-DOH-094D (July 1, 2007). 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 and the date of receipt, March 20, 2007, was the seventh working day after Grievant's Level III appeal was received on March 9, 2007. Either of the hearings scheduled for March 19 or 20, 2007, would have been in compliance with the required timelines.

Grievant cites the statute stating he is entitled to reasonable notice. Reasonable notice is defined as "notice which is plainly calculated to apprise the appropriate person of its contents." Black's Law Dictionary 657 (abr. 5th ed. 1983). With the first hearing, the letter giving the March 19, 2007 hearing information was mailed March 15, 2007, as was the interdepartmental mail, and the email was sent at 1:01 p.m. on Friday, March 16, 2007. This is sufficient notice. It is difficult to understand how Grievant did not receive this notice. The expectation is the U.S. mail would have been received at least by Saturday, March 17, 2007. As for interdepartmental mail, Grievant stated he did not check that mail on Friday afternoon because "WVU had typically ignored the statutory time lines for my prior grievances. . . ." This assertion was not proven, and would not excuse Grievant from a good faith effort to check for a hearing notice. As for Grievant's assertion that email was not working on Friday, Respondent noted other individuals did receive the email and were prepared to appear at the hearing.

In essence, the issue is whether WVU made a good faith effort to send Grievant notice of the March 19, 2007 hearing. The undersigned Administrative Law Judge finds it did, and there was no default on this issue. Additionally, the undersigned Administrative Law Judge finds Grievant, having

experience with the grievance process and knowing the time for scheduling the hearing was short, did not make the necessary effort to check his mail and email. In Ross v. Division of Juvenile Services, Docket No. 03-DJS-296D (January 29, 2004), the Administrative Law Judge noted the grievant "cannot assert a default when Respondent made repeated attempts to contact him at appropriate numbers without success." The same reasoning applies here.

As for the hearing scheduled on March 20, 2007, this hearing was also scheduled within the statutory timeframe, and Grievant agrees he had notice of this hearing. This set of facts is similar to those in Smith, supra. In that case, the hearing was continued several times, but was eventually scheduled on the last day of the required timeframe. The grievant received notice the day before the hearing and refused to attend. As explained by the administrative law judge:

> 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 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).

The administrative law judge found no default occurred, as the respondent attempted to hold a hearing on the seventh working day after it received the Level III appeal, had complied with its statutory obligation, the grievant was the cause of the failure to conduct a hearing within the appropriate timeframe, and the grievant was not entitled to relief.

Again, the same reasoning applies here. Grievant cannot refuse to attend a hearing scheduled within the timelines, and then assert Respondent is in default. While it would certainly be preferable for the date to be agreed on by all the parties and with much advanced notice, this is not required, and, given the short time to schedule the hearing, it is just not possible. The better course is for a respondent to schedule the hearing in a timely manner, and grant a continuance if the grievant wishes to reschedule. This way, a respondent has protected itself from default, a grievant has the opportunity to request additional time to prepare, and the parties have a waiver specifying the new time frame. Butts v. Higher Educ. Interim Committee, Docket No. 01-HE-073DEF (Apr. 30, 2001).

Accordingly, the undersigned finds no default occurred in this case. Respondent attempted to

hold a hearing on the sixth and seventh working days after it received the Level III appeal, complying with its statutory obligation. Grievant was the cause of thefailure to conduct a hearing within the appropriate timeframe. Therefore, he is not entitled to relief. Smith, supra.

As for Respondent Motion to Dismiss the grievance "based upon Grievant's failure to pursue the claim at Level III" is request is also Denied, but the alternative relief is Granted. This grievance is remanded to Level III for a hearing on the merits.

The above-discussion will be supplemented by the following Conclusions of Law.

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).

2. A Level III hearing must be held within seven days of the appeal to Level III hearing. W. Va. Code § 29-6A-4(a). Within this context, days means working days. W. Va. Code § 29-6A-2(c).

3. A grievant cannot assert a default when a respondent has made repeated attempts to contact him at appropriate numbers without success. Ross v. Div. of Juvenile Serv., Docket No. 03-DJS-296D (Jan. 29, 2004).

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. Smith v. Dep't of Highways, Docket No. 05-DOH-094D (July 1, 2007); 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 anormal 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, Grievant's claim for default is **DENIED**. Additionally, Respondent's Motion to Dismiss is also **DENIED**. This case is remanded to Level III, and the parties are directed to hold a Level III hearing within seven days from the receipt of this Decision.

JANIS I. REYNOLDS

Acting Chief Administrative Law Judge

Dated: August 30, 2007

Footnote: 1

The date the appeal is received does not count as a day within the timelines; the next working day does. So, although Grievant sent his appeal on Friday, March 9, 2007, it would not be counted as being received until Monday, March 12, 2007, and this is the day the timelines begin. It is unclear from the evidence presented why Respondent repeatedly states the grievance was not received until March 12, 2007 and the timelines did not begin to run until Tuesday, March 13, 2007.