THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

MICHAEL KANEHL,
Grievant,

v. **DOCKET NO. 2011-0133-DEP**

DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondent.

ORDER DENYING DEFAULT

Michael Kanehl, Grievant, filed a claim of default with the Grievance Board against his employer, the Department of Environmental Protection ("DEP"), on August 12, 2010, alleging a default occurred at level one of the grievance procedure.[1] A hearing was held on October 22, 2010, before the undersigned Administrative Law Judge, for the purpose of taking evidence on the issue of whether a default had occurred.[2] Grievant represented himself, and Respondent was represented by Kristin A. Boggs, Associate General Counsel for DEP. The parties declined the opportunity to submit written argument, and this case became mature for decision upon the conclusion of the hearing, on October 22, 2010.

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[1] As will be discussed in detail in this decision, Grievant subsequently filed three other default claims related to this grievance.

[2] Grievant filed default claims on two grievances, and the default hearing encompassed both grievances. The parties were able to settle one of the grievances after the hearing, and Grievant withdrew that grievance (Docket No. 2011-0134-DEP).

Synopsis

Grievant argued a default occurred when the level one conference on his grievance was not scheduled to be held within ten days of the date the grievance was filed; when it was not held within ten days of the date he placed the grievance in the mail; when he was not given five days' notice of the conference, and did not have time to prepare; when the conference was not held at a location convenient to him; when the level one proceedings were not stayed after the default claims were filed; and when his employer did not file anything in writing contesting his third filing claiming default. The level one conference must be held within ten days of the date it is received by the employer, not from the date the grievant places it in the mail. The level one conference was held within ten days of the date the grievance was received. Grievant's employer initially scheduled the level one conference on the only available date and time, and gave Grievant notice of the conference in a timely manner; however, when Grievant complained that he would have a long drive after the afternoon conference, Respondent rescheduled the conference to try to accommodate Grievant, but the date was past the ten day timeline for holding the conference. Respondent realized its mistake and rescheduled the conference again, but by that time it could not send notice five days before the conference. Grievant contributed to the error, and under these circumstances, the failure to send the notice was not intended to delay the grievance process, and did not amount to a default. Grievant's remaining claims are procedural issues.

The following Findings of Fact are made based upon the record developed at the default hearing.

Findings of Fact

1. Grievant is employed by the Department of Environmental Protection ("DEP"), and is assigned to the eastern panhandle of West Virginia. DEP's main office is in Charleston, West Virginia, approximately a five to six hour drive from Grievant's assigned work location.

2. On August 3, 2010, Grievant filed a grievance, placing it in the mail addressed to DEP and to the Grievance Board. The grievance form indicated that a level one conference was requested.

3. The grievance was received by DEP on August 5, 2010.

4. On August 5, 2010, Nancy Lynn Frazier, an Administrative Services Assistant 3 for DEP, contacted Grievant regarding scheduling the level one conference. Ms. Frazier had been working for DEP for about a year and a half. She first asked Grievant if he would waive the statutory time period for scheduling the level one conference, and Grievant would not agree to waive the statutory time period. This was Ms. Frazier's first experience where a grievant would not agree to waive the statutory time period. Grievant's supervisor was on vacation. Ms. Frazier's supervisor, Sandy Kees, Human Resources Manager, represents DEP at level one conferences, and she told Ms. Frazier that she needed to attend. Other supervisory personnel also needed to attend the conference, and they had scheduling conflicts. These conditions made it difficult to schedule the level one conference within ten days.

5. On August 10, 2010, at 9:02 a.m., Ms. Frazier sent Grievant an email notifying him that the level one conference on his grievance had been scheduled for

August 18, 2010, at 1:30 p.m., in Charleston, West Virginia. Grievant was scheduled to be in Charleston for training that morning, as well as on August 17, 2010.

6. Later that same day Grievant emailed Ms. Frazier stating that he thought the agreement was that the conference would be held before noon on August 18, due to the fact that he would have to drive back home after the conference. Ms. Frazier took this as an objection to the scheduled date and time.

7. Ms. Frazier responded on August 11, 2010, that this was the only time everyone was available, and that her ability to schedule the conference was severely limited because Grievant would not waive the statutory time frame for holding the conference.

8. On August 12, 2010, Grievant replied that he was not willing to waive any rights. He did not indicate an alternate time for holding the conference. Ms. Frazier then responded by email to Grievant erroneously stating that she had 15 working days to schedule the conference, and offered August 24, 25, or 26, 2010, as available dates, and asked Grievant which one would work for him.

9. Grievant responded on August 12, 2010, that he was confused, as Ms. Frazier had previously told him the conference had to be scheduled within 10 days. He reiterated that he was not willing to waive any time frames, but if she wanted him to pick a date, August 24 was his choice.

10. Ms. Frazier responded by email on August 12, 2010, reiterating that DEP had 15 days from receipt of the grievances to hold the level one conference. She concluded by stating that the level one conference would be held on August 24, 2010, at 9:00 a.m.

11. Grievant told Ms. Frazier on August 13, 2010, that after the 13th, DEP would be in default.

12. Ms. Frazier was scheduled to go on vacation, and she did so, leaving this matter in the hands of Carol Elaine Ranson, also an Administrative Services Assistant 3 at DEP. Ms. Ranson does not typically deal with grievances.

13. Ms. Ranson became aware that if the level one conference was held on August 24, 2010, that would be beyond the statutory time period for scheduling the conference. She rescheduled the conference to August 17, 2010.

14. Grievant was notified on August 16, 2010, at 2:30 p.m., by telephone, that the level one conference would be held on August 17, 2010, at 8:00 a.m.[3] Grievant was traveling to Charleston for work related training when he received this notice, and had not packed any of his grievance related documentation.

15. DEP received Grievant's first default claim on August 17, 2010. Prior to receipt of the default claim, however, DEP confirmed on August 16, 2010, that the Grievance Board had received Grievant's first default claim on that date, and DEP was provided a copy of that filing by the Grievance Board.

16. The level one conference was held on August 17, 2010, as scheduled. Grievant stated that he had not had time to prepare and was advised that the conference could be delayed to give him time to prepare, but he declined this opportunity.

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[3] This date was not a convenient date for all of DEP's representatives, which was the reason the conference was not originally scheduled for this date; however, Ms. Ranson was able to persuade some of the attendees to be present despite their prior commitments. Ms. Kees was not able to change her scheduled commitment, and did not attend the conference.

17. DEP objected to the default claim on August 18, 2010. DEP did not respond to each of Grievant's four separate filings claiming separate grounds for default.

Discussion

When a grievant asserts that his employer has failed to respond to the grievance in a timely manner, resulting in a default, the grievant must establish such default by a preponderance of the evidence. *Dunlap v. Dep't of Envtl. Protection*, Docket No. 2008-0808-DEP (Dec. 8, 2008); *Harless v. W. Va. State Police*, Docket No. 07-WVSP-080D (Mar. 21, 2008). "The grievant prevails by default *if a required response is not made by the employer* within the time limits established in this article. . .." W. VA. CODE § 6C-2-3(b)(1). (Emphasis added.) Once the grievant establishes that a default occurred, the employer may show that it was prevented from responding in a timely manner as a direct result of "injury, illness or a justified delay not caused by negligence or intent to delay the grievance process." W. VA. CODE § 6C-2-3(b)(1).

Grievant filed four separate default claims. Grievant argued in his first default motion, filed on August 12, 2010, that a default occurred when Respondent failed to schedule the level one conference to be held within ten days of the date the grievance was *filed*, after he was notified that the conference would be held on August 18, 2010. The time period for holding a level one conference is governed by W. VA. CODE § 6C-2-4(a)(2), which states:

> (2) Conference. -- The chief administrator shall hold a conference within ten days of receiving the grievance. A conference is a private, informal meeting between the grievant and the chief administrator to discuss the issues raised by the grievance, exchange information and attempt to resolve the grievance. The chief administrator may permit other employees and witnesses to attend and participate in a conference to reach a resolution.

> The chief administrator shall issue a written decision within fifteen days of the conference.

"'Days' means working days exclusive of Saturday, Sunday, official holidays and [a]ny day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided for by statute, rule, policy or practice." W. VA. CODE § 6C-2-2(c). This statute clearly states that the time period for a response by the employer begins to run on the date the chief administrator *receives* the grievance, not the date the Grievant files it by placing it in the mail. In this case the record reflects that the chief administrator did not receive the grievance on the date it was signed and placed in the mail by Grievant. DEP received the grievance on August 5, 2010, and initially scheduled the level one conference for August 18, 2010, nine working days after the grievance was received.

Grievant's second default claim was filed on August 13, 2010, after he was notified that his level one conference would be held on August 24, 2010. While this would have been outside the statutory timelines, Respondent realized its error, and the conference was held on August 17, 2010, eight days after the grievance was received by Respondent, and within the required time period.

Grievant's third default claim was filed on August 19, 2010, claiming a default occurred when he was not given five days' notice that the level one conference would be held on August 17, 2010; Charleston was not a convenient location and he did not agree to the location; Grievant did not have time to prepare for the conference; the conference was held on August 17, 2010, and this was beyond the time period for holding the

conference; and the level one proceedings should have been stayed once he filed the first default claim.

First, as has already been addressed above, the level one conference was absolutely held within 10 days of receipt of the grievance by Respondent.

As to the notice argument, W. VA. CODE § 6C-2-3(l) requires, with regard to notice, that:

> Reasonable notice of a proceeding shall be sent at least five days prior to the proceeding to all parties and their representatives and shall include the date, time and place of the proceeding.

The first issue is whether a notice of a proceeding is a "required response," as the default provisions only apply to the failure of the employer to make a required response within the statutory time periods. Once a grievance is received, the employer is required by statute to take certain actions, all of which may be said to be in response to the filing of the grievance. One of the acts which is required of the employer is that it send notice of the proceeding "at least five days prior to the proceeding." The undersigned concludes that sending notice is a required response to a grievance. Respondent acknowledges that it did not send notice five days in advance of the conference, but notes that as soon as it became aware of its error in scheduling the conference beyond the statutory ten day time period, it did everything possible to at least make sure the conference was held within the statutory time period.

Grievant repeatedly pointed out that the grievance procedure is not intended to be a "procedural quagmire." While applicable here, this maxim is misapplied by Grievant.

> This Grievance Board has been directed in the past that "the grievance process is intended to be a fair, expeditious, and simple procedure, and not a 'procedural quagmire.'" *Harmon v. Fayette County Bd.*

> *of Educ.*, Docket No. 98-10-111 (July 9, 1998), citing *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 393 S.E.2d 739 (1990), and *Duruttya v. Bd. of Educ.*, 181 W. Va. 203, 382 S.E.2d 40 (1989). *See Watts v. Lincoln County Bd. of Educ.*, Docket No. 98-22-375 (Jan. 22, 1999). As stated in *Duruttya, supra*, "the grievance process is for "resolving problems at the lowest possible administrative level." Additionally, *Spahr, supra*, indicates the merits of the case are not to be forgotten. *Id*. at 743. *See Edwards v. Mingo County Bd. of Educ.*, Docket No. 95-29-472 (Mar. 19, 1996). Further, *Duruttya, supra*, noted that in the absence of bad faith, substantial compliance is deemed acceptable.

Waters v. Tucker County Bd. of Educ., Docket No. 07-47-006D (May 3, 2007). Respondent was not acting in bad faith. It was difficult to schedule the conference within 10 days due to vacations and other scheduling conflicts, leaving August 18 in the afternoon the only day initially available. However, when Grievant was notified of this time, he complained, yet refused to waive the statutory time period for conducting the level one conference, despite the fact that there is no indication he would have suffered any harm by agreeing to extend the timelines by a few days. There was no effort here by Grievant to help to resolve the scheduling problems, and he is the one who is holding his employer's feet to the fire, jumping at the opportunity to claim that DEP did not follow the proper procedures.

W. VA. CODE § 6C-2-3(b)(1) excuses the employer from making a required response within the statutory timelines if the employer is prevented from making the response "directly as a result of injury, illness or a justified delay not caused by negligence or intent to delay the grievance process." The undersigned must also keep in mind that,

> [t]he time periods in the grievance procedure are not jurisdictional in nature and are subject to equitable principles of tolling, waiver, and estoppel. *Jackson, supra; Gaskins v. W. Va. Dep't of Health*, Docket No. 90-H-032 (Apr. 12, 1990). This Grievance Board has frequently applied such principles, specifically estoppel, to toll the time for filing a grievance. *See*,

> e.g., *Lilly v. Raleigh County Bd. of Educ.*, Docket No. 94-41-195 (Nov. 28, 1994). In order to prevail in a claim of estoppel, a party must show that there was a representation made or information given by the opposing party which was relied upon, causing an alteration of conduct or change of position to the first party's detriment. *Ara v. Erie Insurance Co.*, 182 W. Va. 266, 387 S.E.2d 320 (1989).

Rhodes v. Randolph County Bd. of Educ., Docket No. 00-42-233D (Jan. 17, 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. *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).

Miller v. Fairmont State Univ., Docket No. 08-HE-005 (Jan. 8, 2009).

In *Akers v. Higher Education Interim Governing Board/Bluefield State College*, Docket No. 01-HE-039D (May 3, 2001), the Grievance Board concluded under similar circumstances, that "the failure to conduct a level one hearing within the statutory period must be attributed, at least in part, to Grievant's refusal to meet" when his supervisor was available. "To hold the [Respondent] in default in these circumstances would encourage grievants to refuse to cooperate with their employers as a means of obtaining relief without providing evidence to support their claims. *See Harmon v. Div. of Corrections,* Docket No. 98-CORR-284D (Oct. 6, 1998); *Brown v. W. Va. State Bd. of Directors/Bluefield State College,* Docket No. 92-BOD-128 (Mar. 30, 1994); *Jack v W. Va. Div. of Human Serv.*, Docket No. 90-DHS-524 (May 14, 1991)." *Id.* Indeed, it appears that Grievant's lack of

cooperation was engineered to create a default in this case. It is clear that Respondent's intent was to comply with the required statutory timelines, and it did not act with intent to delay the grievance process. Grievant's own actions contributed to the delay. The undersigned concludes that Respondent cannot be found to have defaulted by failing to send notice five days before the conference under these circumstances.

Grievant's remaining claims are procedural issues. The default provisions are applicable only where the employer fails to make a required response. Whether the conference was held in a convenient location, whether Grievant had time to prepare, and whether the proceedings should have been stayed are not responses to the filing of the grievance. It will be noted, however, that Grievant was in Charleston for training on the day the conference was held; therefore his claim that the conference was not held in a convenient location is without merit. As to the lack of time to prepare, it is unfortunate that Grievant was not given much notice of the conference, but Grievant had the option of requesting a continuance, and extending the statutory timelines to a date in the future when he would have been prepared. It was his choice.

As to the stay, the Grievance Board's procedural rules which provide that the proceedings are automatically stayed once a default claim has been filed (156 C.S.R. 1 § 7.1) are in place to give some guidance to the parties and some order to the proceedings. This is a procedural rule only, not a statute, and cannot be used to claim default. No harm was done by Respondent holding the level one conference in order to ensure that it was held within ten days, which is what Grievant insisted he wanted. Further, Respondent had very little time to react to the situation, as Grievant chose to use only the mail to file his various default claims, which took several days for Respondent to receive, rather than also

notifying his employer of his claims by some more immediate notification means, such as email, which had been used by Respondent and Grievant to attempt to schedule the conference.

Finally, on August 31, 2010, Grievant claimed the default should be granted because Respondent did not object to the default claims filed on August 19. On August 18, 2010, Respondent filed its response to the first default claim. Once Grievant claimed that a default had occurred, his subsequent motions merely added additional grounds in support of his default claim. Once Respondent objected to the default claim, it was not required to respond in kind to every subsequent argument advanced by Grievant. Grievant is seeking to turn this proceeding into a procedural quagmire, where one technical slip-up would result in his grievance being granted, whether there is any merit to it or not. "The grievance procedure should not become a trap for either the employees or employers, but rather it should work so that disputes are resolved consistently and fairly, as early as possible within the procedure." *Rutherford v. W. Va. Bureau of Emp. Programs*, Docket No. 03-BEP-040D (Mar. 24, 2003).

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. When a grievant asserts that his employer is in default, the grievant must establish such default by a preponderance of the evidence. *Dunlap v. Dep't of Envtl. Protection*, Docket No. 2008-0808-DEP (Dec. 8, 2008); *Harless v. W. Va. State Police*, Docket No. 07-WVSP-080D (Mar. 21, 2008). Once the grievant establishes that a default occurred, the employer may show that it was prevented from responding in a timely

manner as a direct result of "injury, illness or a justified delay not caused by negligence or intent to delay the grievance process." W. VA. CODE § 6C-2-3(b)(1).

2. A level one conference must be held ten working days of the date the grievance was *received* by the chief administrator. W. VA. CODE § 6C-2-4(a)(2).

3. The level one conference was held within ten working days of the date the grievance was received by Respondent, in compliance with the statutory requirements.

4. Notice of a level one conference must be sent to all parties at least five working days in advance of the conference. W. VA. CODE § 6C-2-3(l).

5. Notice of the level one conference was not sent to Grievant in a timely manner.

6. An employer is excused from making a required response within the statutory time limits where the delay in response is not caused by negligence or intent to delay the grievance process. W. VA. CODE § 6C-2-3(b)(1).

> 7. The time periods in the grievance procedure are not jurisdictional in nature and are subject to equitable principles of tolling, waiver, and estoppel. *Jackson, supra; Gaskins v. W. Va. Dep't of Health*, Docket No. 90-H-032 (Apr. 12, 1990). This Grievance Board has frequently applied such principles, specifically estoppel, to toll the time for filing a grievance. *See*, e.g., *Lilly v. Raleigh County Bd. of Educ.*, Docket No. 94-41-195 (Nov. 28, 1994). In order to prevail in a claim of estoppel, a party must show that there was a representation made or information given by the opposing party which was relied upon, causing an alteration of conduct or change of position to the first party's detriment. *Ara v. Erie Insurance Co.*, 182 W. Va. 266, 387 S.E.2d 320 (1989).

Rhodes v. Randolph County Bd. of Educ., Docket No. 00-42-233D (Jan. 17, 2001).

> 8. [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).

Miller v. Fairmont State Univ., Docket No. 08-HE-005 (Jan. 8, 2009).

9. Respondent at all times acted in good faith in attempting to respond to the grievance within the statutory timelines, and did not act with intent to delay the grievance process.

10. Grievant contributed to the error in scheduling the level one conference. *Akers v. Higher Education Interim Governing Board/Bluefield State College*, Docket No. 01-HE-039D (May 3, 2001).

Accordingly, Grievant's request for judgment by default is **DENIED.** Grievant has already filed an appeal to level two. The parties are **ORDERED** to confer and to provide the Grievance Board with five mutually agreeable dates for scheduling the level two mediation, by no later than December 20, 2010.

BRENDA L. GOULD
Administrative Law Judge

Date: December 7, 2010