THOMAS F. LAMBERT,

Grievant,

v.

DOCKET NO. 99-HHR-326D

WEST VIRGINIA DEPARTMENT OF HEALTH
AND HUMAN RESOURCES and
DIVISION OF PERSONNEL,

Respondents.

ORDER DENYING GRIEVANT'S MOTION FOR DEFAULT

Grievant, Thomas F. Lambert, moved for a default judgment against his employer, West Virginia Department of Health and Human Resources ("DHHR") and the Division of Personnel ("Personnel"). A hearing was held in the Grievance Board's Charleston, West Virginia, offices on October 7, 1999, solely for the purpose of hearing evidence regarding Grievant's default motion. Grievant appeared pro se and DHHR was represented by Dennise Smith, Esq., Assistant Attorney General. Personnel did not appear.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts:

1. Grievant is currently employed by DHHR as a Social Service Worker III. Grievant filed a grievance on June 1, 1999, against DHHR and Personnel, alleging he was misclassified. (See footnote 1) 2. Grievant's immediate supervisor, Stephen E. Willis, heard the grievance at level one and issued a level one decision denying the grievance on June 8, 1999.

3. Grievant appealed to level two on June 14, 1999, and received a level two decision from

Sharon Winkler-Serena, denying the grievance, on June 28, 1999.

4. Grievant appealed to level three on June 29, 1999.

5. Grievant was contacted by Barbara Wheeler, the level three grievance evaluator, on July 1, 1999, to discuss his grievance, and to attempt to effectuate a settlement between the parties.

6. On that same day, Ms. Wheeler contacted Ms. Winkler-Serena regarding possible settlement of Grievant's claim. Ms. Winkler-Serena contacted DHHR's Personnel Director, Michael McCabe regarding settlement.

7. On July 2, 1999, Mr. McCabe informed Ms. Winkler-Serena that the agency's position would not change, and it considered Grievant's back pay award limited to 10 days prior to the filing of his grievance. R. Ex. 5.

8. On July 6, 1999, Ms. Winkler-Serena forwarded that information to Ms. Wheeler. R. Ex. 6.

9. Ms. Wheeler contacted Grievant on July 6, 1999, to relay the information received from Mr. McCabe.

10. At that time, Ms. Wheeler contacted the parties regarding a date to schedule the level three hearing. 11. All of the parties, including Grievant, agreed that the level three hearing would take place on July 21, 1999.

12. A Notice of Hearing was issued by Ms. Wheeler on July 7, 1999, setting the level three hearing for July 21, 1999.

13. More than seven days passed between the date Grievant appealed his grievance to level three and the date of the level three hearing.

14. The level three decision was issued on July 28, 1999, and Grievant received the decision on or about that date.

15. Grievant appealed to level four on August 6, 1999. A level four hearing was scheduled for October 6, 1999.

16. Grievant alleged a default occurred at level three by letter dated September 1, 1999.

DECISION

Grievant alleges DHHR and DOP violated the time limitations prescribed in the grievance statute for State employees, W. Va. Code §§ 29-6A-1, et seq, and therefore he prevails by default. (See footnote 2) At level three, "[t]he chief administrator or his or her designee shall hold a hearing in

accordance with section six of this article within seven days of receiving the appeal. " W. Va. Code § 29-6A-4(c). W. Va. Code § 29-6A-3(a) provides, in pertinent part:

> (2) Any assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf of the employer at or before the level two hearing. 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 a 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).

Further, W. Va. Code § 29-6A-5(a) provides that "[t]he [grievance] board has jurisdiction regarding procedural matters at levels two and three of the grievance procedure."

Grievant appealed his level two decision in this matter on June 19, 1999. Grievant's level three hearing was scheduled for July 21, 1999, more than seven days after receipt of Grievant's level two appeal.

DHHR presented evidence that demonstrated that Grievant spoke to Barbara Wheeler, the level three grievance evaluator, on July 6, 1999, at which time he, and the other parties, agreed on the July 21, 1999 level three hearing date. Moreover, Grievant did not object at that time, nor indicate that he believed DHHR was in default over the late scheduling of the hearing. Grievant did not object or raise the issue of default at the levelthree hearing, nor in between the time of the hearing the receipt of his level three decision on or about July 28, 1999. Grievant did not raise the issue of default at level three until August 30, 1999. In fact, Grievant did not raise a default issue at level three until after he made default allegations regarding the proceeding at level four.

DHHR denies it defaulted on the grievance at level three, due to Grievant's acquiescence in the July 21, 1999, hearing date. In the alternative, DHHR argues that its delay in scheduling the hearing was due to "unavoidable cause", "excusable neglect" and "fraud."

It has been settled by the West Virginia Supreme Court of Appeals, as well as this Grievance Board, that a grieved employee must raise the "relief by default" issue during the grievance proceedings as soon as the employee becomes aware of such default. See Syl. Pt. 4, Hanlon v.

Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997); State ex rel. Catron v. Raleigh County Bd. of Educ., 201 W. Va. 302, 496 S.E. 399 (1997); Brown v. W. Va. Dept. of Health and Human Resources, Docket No. 99-HHR-027 (June 2, 1999). See also Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995). In the instant case, seven days following Grievant's appeal to level three would have been July 9, 1999, excluding Saturday, Sunday, and the Fourth of July holiday. Grievant had a level three hearing on July 21, 1999, received the level three decision on July 28, 1999, but did not raise the issue of default until August 30, 1999, after he had appealed to level four. Because Grievant waited until after the level three hearing and after he received the level three decision, he is deemed to have waived entitlement to the relief provided in the default provision of W. Va. Code § 29-6A-3(a). Grievant alleges, however, that he did not become aware that the level three grievance evaluator was in default until August 30, 1999, when he read the statute in regard to the proceedings at level four. Consistent with the ruling of the West Virginia Supreme Court of Appeals in Spahr v. Preston County Board of Education, 182 W. Va. 726, 391 S.E.2d 739 (1990), this Grievance Board has determined that an employee may file a grievance within ten days after discovering the facts which give rise to his or her grievance. See, e.g., Butler v. W. Va. Dept. of Transp., Docket No. 99-DOH-084 (May 13, 1999); Little v. W. Va. Dept. of Health & Human Resources, Docket No. 98-HHR-092 (July 27, 1998). However, mere discovery of a legal theory to support a grievance, or learning of the success of another employee's grievance, does not constitute discovery of an "event" giving rise to a grievance within the intent of W. Va. Code § 18-29-4 as interpreted in Spahr. Adkins v. W. Va. Dep't of Educ., Docket No. 95-DOE-507 (Apr. 26, 1996). See Pack v. Kanawha County Bd. of Educ., Docket No. 93-20-483 (June 30, 1994); Floren v. Kanawha County Bd. of Educ., Docket No. 93-20-327 (May 31, 1994); Chambers-Cooper v. Roane County Bd. of Educ., Docket No. 90-44-385 (Jan. 15, 1991).

Grievant was aware of the facts giving rise to his claim of default seven days after filing his appeal, when a level three hearing on his grievance had not been scheduled. The “discovery” of the default provision of the grievance statute on August 30, 1999, does not constitute an “event” giving rise to a grievance. Thus, Grievant's discovery claim must fail.

CONCLUSIONS OF LAW

1. At level three, “[t]he chief administrator or his or her designee shall hold a hearing in

accordance with section six of this article within seven days of receiving the appeal. " W. Va. Code § 29-6A-4(c). 2. W. Va. Code § 29-6A-3(a) provides that, "[t]he 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 . . ., unless prevented from doing so directly as a result of sickness, injury, excusable neglect, unavoidable cause or fraud."

3. A grieved employee must raise the "relief by default" issue during the grievance proceedings as soon as the employee becomes aware of such default. See Syl. Pt. 4, Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997); State ex rel. Catron v. Raleigh County Bd. of Educ., 201 W. Va. 302, 496 S.E. 399 (1997); Brown v. W. Va. Dept. of Health and Human Resources, Docket No. 99-HHR-027 (June 2, 1999). See also Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995).

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. 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). Hanlon, supra.

5. Because Grievant agreed to the July 21, 1999 level three hearing date, and did not thereafter raise the default issue until August 30, 1999, well after receipt of the level three decision, he has waived entitlement to the default provisions of W. Va. Code § 29- 6A-3(a). Accordingly, Grievant's Motion for Default is **DENIED**. This matter will remain on the docket for further adjudication at Level IV. The representatives of the parties are requested to confer and provide agreed dates to conduct the Level IV hearing on the merits of this grievance.

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MARY JO SWARTZ

Administrative Law Judge

Dated: October 14, 1999

Footnote: 1

Subsequent to the filing of the grievance, Personnel agreed to reclassify Grievant to his current Social Service

Worker III position. The only issue remaining before thisGrievance Board is whether Grievant is limited to receiving back pay to 10 days prior to the filing of his grievance.

Footnote: 2

Grievant also alleged a default occurred at level four because his hearing was not scheduled within fifteen (15) days of his appeal. The Grievance Board maintains, and the Harrison County Circuit Court has affirmed, that level four administrative law judge's are not subject to the default provisions of W. Va. Code § 29-6A-3(a). Flint v. Bd. of Educ. of Harrison County, Civil Action No. 95-C-485-1 (Nov. 10, 1998). Specifically, the Circuit Court stated in paragraph 28 of its Order that, "Chapter 18, Article 29, Section 3(a) and 4(d)(2) of the Code of West Virginia requiring that a grievance evaluator respond within thirty days of a hearing or a grievant shall prevail by default do not apply to Administrative Law Judges over which neither part has control." Therefore, this issue will not be addressed further in this decision.