SHANNON GERENCIR,

Grievant,

v. Docket No. 01-20-500D

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent,

and

CARMELLA CRAWFORD,

Intervenor.

ORDER DENYING DEFAULT

Grievant, Shannon Gerencir, filed a grievance in May of 2001, when Intervenor, Carmella Crawford, was selected for the girls' volleyball coach position for the 2001-2002 school year, a position which Grievant held during the 2000-2001 school year. On September 8, 2001, Grievant appealed the Level II decision denying her grievance to Level IV, and also claimed that her employer, Respondent Kanawha County Board of Education ("KBOE"), was in default. On October 25, 2001, Intervenor filed a Motion to Dismiss Grievant's claims on the grounds that Grievant was not an employee of KBOE, and could not file a grievance. A Level IV hearing was held on November 2, 2001, for the purpose of taking evidence on the Motion to Dismiss and on the issues of whether a default occurred and whether KBOE had a statutory excuse to the default claim. Grievant was represented by Chanin Wolfingbarger Krivonyak, Esquire, KBOE was represented by James W. Withrow, Esquire, and Intervenor was represented by Perry Bryant. This matter became mature for decision upon receipt of Grievant's written argument on November 13, 2001. Respondent submitted oral argument at the close of the hearing, and declined to submit written argument. Intervenor's written argument was received on November 9, 2001. (See footnote 1)

The default provision for education employees is found in W. Va. Code § 18-29- 3(a), which

provides:

> A grievance must be filed within the times specified in section four of this article and shall be processed as rapidly as possible. The number of days indicated at each level specified in section four of this article shall be considered as the maximum number of days allowed and, if a decision is not rendered at any level within the prescribed time limits, the grievant may appeal to the next level: Provided, That the specified time limits may be extended by mutual written agreement and shall be extended whenever a grievant is not working because of such circumstances as provided for in section ten, article four, chapter eighteen-a of this code. Any assertion by the employer that the filing of the grievance at level one was untimely must be asserted by the employer on behalf of the employer at or before the level two hearing. 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 or illness, the grievant shall prevail by default. Within five days of such 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 that presumption. If the examiner finds that the remedy is contrary to law, or clearly wrong, the examiner may modify the remedy to be granted so as to comply with the law and to make the grievant whole.

The burden of proof is upon the grievant asserting a default has occurred to prove the same by a preponderance of the evidence. (See footnote 2) Harmon v. Div. of Corrections, Docket No. 98-CORR-284 (Oct. 6, 1998). "The preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Resources, Docket No. 92-HHR- 486 (May 17, 1993). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

Grievant claims a default occurred at Level II because the Level II hearing was not held within the statutory time periods, and the Level II decision was not issued within the statutory time periods, “despite the Grievant's repeated attempts to bring some timely resolution to the matter, and repeated requests to obtain a final hearing with all the necessary witnesses there”. (See footnote 3) W. Va. Code § 18-29-4(b) provides that, at Level II:

> Within five days of receiving the decision of the immediate supervisor, the grievant may appeal the decision to the chief administrator, and such administrator or his or her designee shall conduct a hearing in accordance with section six of this article within five days of receiving the appeal and shall issue a written decision within five days of such hearing. Such decision may affirm, modify or reverse the decision appealed from.

Respondent argued that, when Grievant's counsel requested a continuance of the Level II hearing set for June 15, 2001, this constituted a waiver of the statutory timelines, and she also waived the

timelines when she agreed to other hearing dates. Respondent argued it acted in good faith in getting the Level II hearing reset as quickly as possible.

The following findings of fact are derived from the record developed at the Level IV hearing, including stipulations of fact agreed to by the parties at the hearing.

Findings of Fact

1. Grievant does not hold a teaching certificate, and is not employed by KBOE as a regular or substitute professional or service personnel employee.

2. Grievant was employed by KBOE under a contract to coach girls' volleyball during the 2000-2001 school year. The contract states that she is an employee, that she agreed to perform extracurricular duties coaching volleyball during the 2000-2001 school year for the sum of $1500.00, and that she would be paid upon completion of those duties, or as mutually agreed by the parties.

3. Grievant was paid one time during the 2000-2001 school year, on November 8, 2000. The girls' volleyball season ended in November 2000.

4. Grievant requested an informal conference on April 13, 2001, and filed this grievance in May of 2001.

5. Grievant appealed the Level I decision on her grievance to Level II on June 8, 2001. The grievance was scheduled for a Level II hearing on June 15, 2001, at 9:00 a.m. Bill Courtney, KBOE's Director, Employee Relations, notified the parties of the hearing date by letter dated June 12, 2001.

6. Grievant's attorney called Bill Courtney on June 12, 2001, at 11:35 a.m., and gave him dates she was available to schedule the Level II hearing, which dates were, June 18, 19, 20, 21, and 25, 2001.

7. On June 14, 2001, at 9:30 a.m., Grievant's attorney attempted to call Mr. Courtney about the hearing, but was unable to reach him and left a message.

8. Because Grievant's attorney had requested a continuance, which request was granted, by letter dated June 15, 2001, Mr. Courtney notified Grievant's attorney that the hearing could be rescheduled for the afternoon of June 22 or 25, the morning of June 28, or all day June 29, 2001.

9. The Level II hearing was held on Friday, June 29, 2001, beginning at 2:30 p.m. Subpoenas were issued for four witnesses at Grievant's request. One of those witnesses, Intervenor, did not appear. Intervenor was not a party to the proceedings at this time. Between 5:00 and 6:00 p.m., the

Level II grievance evaluator, Leonard Allen, stated he needed to leave because he had something else he had to go to. Grievant's attorney asked to continue with the hearing on that day to take the testimony of a number of witnesses who were present at that time. Her request was denied.

10. Intervenor was in Virginia providing instruction at a workshop from June 24 through 29, 2001, and returned at 9:30 p.m. on the 29th. Intervenor spoke with her husband around 10:00 p.m. on June 28, 2001, and he told her he had found a subpoena for her to appear at the hearing the next day under a rock on their porch.

11. The second day of the Level II hearing was held on July 17, 2001.

12. A subpoena was issued for Intervenor to appear at the July 17, 2001 hearing. She still was not a party to the proceedings at this time. Intervenor was out of town staying with her dying mother in Beckley from June 29 through July 14, 2001. Her mother died on July 15, 2001, and her father-in-law, who also lived in Beckley and had been in the hospital there during this time period, died on July 19, 2001. Intervenor's Exhibits 3 and 4, Death Certificates. While Intervenor and her husband were in Beckley attending to these matters, their housekeeper, Virginia Matheny, would stop by their home in Charleston on occasion to feed the cats, water the plants, take the mail inside, and clean the house. She was at their home on the morning of July 17, 2001, around 10:00 a.m., when the doorbell rang. Ms. Matheny opened the door. A woman was standing outside the door, and Ms. Matheny asked her if she could help her. The woman said nothing to her, handed her an envelope, and quickly turned and left. Ms. Matheny did not open the envelope, and did not know what was in the envelope. She laid the envelope on the kitchen table. Intervenor's husband returned to their home in Charleston around 6:00 p.m. on July 19, 2001. There was a note on the table from Ms. Matheny that she had been given an envelope. The envelope contained a subpoena for Intervenor to appear at the hearing on July 17, 2001.

13. Intervenor did not appear for the Level II hearing on July 17, 2001. John Clendenen, Principal of Capital High School, stated during the hearing that Intervenor's mother's funeral was that day, and he doubted that the funeral had been postponed for the hearing. He later stated he was in error, and the funeral was July 18, and visitation was that evening at the Wilkinson Funeral Home in Sophia. Nonetheless, Grievant's counsel pointed out that there was some difficulty getting Intervenor subpoenaed for the June 29th hearing, and “I cannot say for certain that [Ms. Crawford is] avoiding the subpoenas but there is a high indication or suspicion that [she is].” She further stated that they

were “finally able to track her down,” and Ms. Crawford had been personally served the subpoena the morning of July 17, 2001. She went on to state that she was “very suspicious” that Intervenor had avoided the subpoena “as much as [she] possibly could,” and noted that after being served she had not appeared. She stated that Intervenor had a duty to call when the subpoena was delivered to her that morning to advise that she would not be present, and asked that she be held in contempt if it could not be established that there was a death in the family; then she added she understood if there was a death in the family, but stated again later that she believed Intervenor was in contempt. Mr. Allen did not make a finding that Intervenor was in contempt. Grievant's counsel then sent Intervenor a letter dated July 18, 2001, in which she stated that the hearing had been rescheduled to July 19, 2001, at 9:00 a.m., and that she was ordered to appear at that time, stating “[y]our failure to appear on Tuesday, July 17 is in contempt of a lawful order of an administrative body and in contempt of the laws of the State of West Virginia. However, assuming that there were unforeseen circumstances that prevented your appearance on Tuesday, there has been no finding of contempt as of yet - provided, however, that you appear and testify on July 19 at 9:00 a.m.” The record does not reflect how Grievant's counsel believed Intervenor would be able to receive this letter, either by hand-delivery or U.S. mail prior to July 19, 2001, at 9:00 a.m., when she was attending the funeral of her mother in Beckley on July 18, as Mr. Clendenen had pointed out. After receiving this letter, Ms. Crawford acquired representation and asked to intervene.

14. Grievant's counsel stated at the Level II hearing on July 17, 2001, when the parties were discussing scheduling another day of hearing in order to take the testimony of Intervenor, whom she stated she considered a critical witness:

> We've been forced to go forward on two occasions without all of our witnesses and if we can get it done or get it taken care of this week I would like to do that regardless of whether Mr. Clendenen is available or not.

July 17, 2001 Level II transcript at page 54. The parties then discussed scheduling the hearing on Friday, July 20, 2001. Grievant's counsel then stated:

> I would ask that we try and get it scheduled some time this week. Obviously we've gone way beyond the time period that _ and I know that there were certain factors that played into that, and I'm not saying that it was, you know, all our fault or all your-alls fault. I think it was a combination of the two, but the purpose behind the whole grievance at Level I through Level IV is to get things taken care of expeditiously, so if at all possible I'd like to have that concluded this week if we can. We've only got one witness left. I don't absolutely have to have Ms. Proctor but I absolutely do have to

> have Ms. Crawford. If we can get that one witness taken care of even if it's by telephone conference I would ask that we do that.

July 17, 2001 Level II transcript at page 55. Mr. Allen then stated they would have to look at schedules to see if July 20 would work. Respondent's counsel suggested that they try to meet on Thursday, July 19, 2001, in the morning, and Mr. Allen stated he could probably do it then, but he would have to check his schedule.

15. After the Level II hearing on July 17, 2001, Mr. Allen found out that he was not available on July 19, 2001, to schedule the final day of the hearing, and Grievant's attorney was informed of this on July 18, 2001.

16. Grievant's attorney placed a telephone call to Respondent's counsel on July 18, 2001, and left a message for him. On July 20, 2001, she placed a telephone call to Respondent's counsel and spoke with him about rescheduling the hearing.

17. Respondent's counsel was out of town on vacation the last week of July 23 through 27, 2001, and Grievant's counsel was out of town for a two week period at that point in military training.

18. Mr. Courtney sent Grievant's counsel a letter dated August 3, 2001, asking whether she and Grievant were available to continue with the hearing on August 13 or 16, 2001. The letter stated he would have to check with Mr. Allen to see whether he was available on those dates, and Mr. Allen was out of the office until the following Tuesday.

19. On August 7, 2001, Grievant's counsel placed a telephone call to Mr. Courtney, in response to his August 3, 2001 letter.

20. On August 7, 2001, Mr. Courtney notified the parties that the Level II hearing would be reconvened on August 22, 2001, at 3:00 p.m.

21. On August 8, 2001, Grievant's attorney sent Mr. Courtney a letter stating:

> After you and I spoke yesterday, I had a chance to call Shannon Gerencir to discuss her availability. Unfortunately, she is scheduled to be out of town on vacation during the week that we determined both Mr. Withrow's availability and my own. Ms. Gerencir is willing to stay in town until Monday, August 20th, if we can conduct a hearing that day. We would prefer to finalize this hearing, if at all possible, on the afternoon of August 20th. If, however, for some reason either Mr. Withrow or Mr. Allen is unavailable, then I would appreciate it if you would contact me with some possible dates of availability for the week of August 27th.

I thank you for your cooperation in this regard. If you wish to discuss this further, please feel free to contact me. I look forward to hearing from you.

22. Grievant decided to submit the grievance for decision without Intervenor's testimony, and the third day of hearing was never held. Grievant's counsel mailed her written argument to Mr. Allen on August 29, 2001, and she mailed her amended written argument on August 30, 2001.

23. The Level II decision was issued on September 4, 2001.

Discussion

The first issue is whether Grievant was an employee of KBOE when she filed this grievance, and thus, whether she had the right to file a grievance. Only employees may file grievances. W. Va. Code §§ 18-29-1 and 18-29-2(d). W. Va. Code § 18-29-2(c) defines an employee as, “any person hired as a temporary, probationary or permanent employee by an institution either full or part time. A substitute is considered an employee only on matters related to days worked for an institution or when there is a violation, misapplication or misinterpretation of a statute, policy, rule, regulation or written agreement relating to such substitute.”

Intervenor made several arguments in support of her Motion to Dismiss. Intervenor pointed to the definition of employee found in Black's Law Dictionary which talks about control of the person's actions and whether the person was working for wages, noting that once the volleyball season ended in November 2000, no one could tell Grievant how to coach and she was no longer receiving wages. While interesting, this definition distinguishes an employee from an independent contractor, and is not controlling here. The controlling definition of employee is found in the statute quoted above.

Intervenor also cited the authority of the State Superintendent of Schools to issue certificates and permits, found in W. Va. Code § 18-3-2a(4). That provision states that persons employed under this subsection shall not be considered an employee for salary or benefit purposes other than as specified in the contract, and that Grievant's contract does not state she is entitled to the benefits of the grievance procedure. Intervenor also argued that Grievant's contractual relationship with KBOE ended when the volleyball season ended, as she was paid once on November 8, 2000, and her contract states she is employed “during” the 2000-2001 school year to coach volleyball, not “for” the school year.

Grievant argued her contract with KBOE employed her for the school year. She also relied upon

Mr. Courtney's statement to her that she was an employee, and the fact that he gave her a grievance form.

W. Va. Code § 18-3-2a does not confer, nor does it remove, grievance rights. Those are conferred in W. Va. Code §§ 18-29-1, et seq. Grievant's contract calls her an employee, and KBOE has not contested her claim that she was an employee with grievance rights. Grievant was hired under a contract to fill a vacancy in an extracurricular coaching position. Under the facts presented here, she was an employee for purposes of the grievance procedure.

As to the argument that Grievant's employment ended in November 2000, the contract does not state that she will cease being an employee at the end of the volleyball season. It states only that she is employed to coach volleyball during the 2000-2001 school year. Had KBOE intended Grievant's duties to end in November 2000, and her employment to end at that time, it could have worded the contract in this fashion. While her hands-on coaching duties ended at that time, this does not mean KBOE could not have called upon her during the remainder of the school year had some question arisen with regard to the volleyball program. Grievant was an employee of KBOE at the time she requested an informal conference in April 2001, and when she filed her grievance in May 2001.

The second area to be addressed is Mr. Allen's action in concluding the Level II hearing on June 29, 2001, between 5:00 and 6:00 p.m. This is a procedural matter, the validity of which is appealable to Level IV, not a matter about which a default may be claimed. Stanley v. W. Va. Dep't of Tax and Revenue, Docket No. 99-T&R-155D (June 10, 1999). “The default provision contemplates a situation where the grievance process has been aborted due to the inaction of the employer and/or its grievance evaluator.” Id. Were the undersigned to address whether Mr. Allen had good cause to conclude the hearing between 5:00 and 6:00 p.m. on a Friday evening, his ruling would be upheld.

As to the rest of the default issues, there is no question that there was no default. The Level II hearing was scheduled within five working days of Grievant's appeal to Level II. Grievant, however, did not find this date to be acceptable, and her counsel offered alternative dates for the hearing which were beyond the five day statutory time period. Grievant's counsel noted that when Mr. Courtney provided additional dates to reschedule the hearing, only one of those dates matched any of the dates she had provided to him, June 25. Grievant's counsel told Mr. Courtney this was an acceptable date for the hearing, and that is the end of the inquiry on this point. It is of no consequence that this was the only date he provided which matched her availability. The parties did not indicate why the

hearing was not held on that date, but was instead held on June 29, 2001.

Although W. Va. Code § 18-29-3(a) provides that the timelines may be extended by mutual written agreement, it is not necessary to reduce the agreement to writing if the parties have verbally agreed, or the Grievant's actions constitute a waiver of the statutory time requirements. Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995); Bowyer v. Bd. of Trustees, Docket No. 99-BOT-197D (July 13, 1999). See also, Hanlon v. County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997). The timelines were extended in this matter by the actions of Grievant's counsel and by the agreements of the parties, as detailed in the findings of fact. Mullins v. Kanawha County Bd. of Educ., Docket No. 01-20-038D (April 10, 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. 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, supra, at 201 W. Va. 316. Grievant's counsel admitted at the Level II hearing that she and Grievant were as much at fault as Respondent in getting the hearing completed in a timely manner. She also stated that Intervenor was a critical witness, and the hearing process could not be completed without her testimony, yet she failed to take the basic step of assuring that Intervenor was properly subpoenaed for any hearing.

It will be noted that, putting aside for a moment the fact Intervenor was not properly subpoenaed, it is crystal clear that Intervenor had legitimate reasons for not appearing at any Level II hearing. Grievant's counsel's statements to the contrary were completely without foundation.

In addition, it is appropriate to make the following conclusions of law.

Conclusions of Law

1. Only employees may file grievances. W. Va. Code §§ 18-29-1 and 18-29- 2(d). W. Va. Code § 18-29-2(c) defines an employee as, “any person hired as a temporary, probationary or permanent employee by an institution either full or part time. A substitute is considered an employee only on matters related to days worked for an institution or when there is a violation, misapplication or misinterpretation of a statute, policy, rule, regulation or written agreement relating to such substitute.”

2. At the time she filed her grievance, Grievant was employed by KBOE as an employee, under a contract to fill an extracurricular coaching vacancy, and was eligible to utilize the grievance procedure.

3. "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 or illness, the grievant shall prevail by default." W. Va. Code § 18-29-3(a).

4. The issue of whether the Level II hearing should have been completed on June 29, 2001, is a procedural matter, the validity of which is appealable to Level IV, not a matter about which a default may be claimed. Stanley v. W. Va. Dep't of Tax and Revenue, Docket No. 99-T&R-155D (June 10, 1999). “The default provision contemplates a situation where the grievance process has been aborted due to the inaction of the employer and/or its grievance evaluator.” Id.

5. The statutory timelines may be extended by mutual agreement, or by the actions of the parties. Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995); Bowyer v. Bd. of Trustees, Docket No. 99-BOT-197D (July 13, 1999).
W. Va. Code § 18-29-3(a). It is not necessary to reduce the agreement to writing if the parties have verbally agreed, or the Grievant's actions constitute a waiver of the statutory time requirements. Martin v. Randolph County Bd. of Educ., 195 W. Va. 297, 465 S.E.2d 399 (1995); Bowyer v. Bd. of Trustees, Docket No. 99-BOT-197D (July 13, 1999). See also, Hanlon v. County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997).

6. No default occurred, as the timelines for holding the Level II hearing were extended by agreement of the parties, and Grievant, by her actions, waived her right to assert a default occurred under these circumstances.

Accordingly, the default claim is **DENIED**, and this matter will be set for hearing on the merits. The parties are directed to confer, and to provide this Grievance Board, by December 10, 2001, with five dates when all parties are available for hearing.

BRENDA L. GOULD

Administrative Law Judge

Dated: November 30, 2001

Footnote: 1

Intervenor moved to strike Grievant's written argument because it made assertions which were not in evidence. In particular, Intervenor objected to assertions made about her coaching status. The undersigned ruled at the hearing that, inasmuch as there was no allegation that Intervenor did not hold the coaching position, whether she was on a leave of absence and whether such leave of absence was properly granted, was not an issue in this matter. This issue need not be revisited, and Grievant's written argument will not be stricken. The undersigned will note that she would decline to take judicial notice of information reported in the newspaper as suggested by Grievant.

Footnote: 2

If the respondent is the party appealing to Level IV, asserting that the remedy received is contrary to law or clearly wrong on the grounds no default occurred, the burden of proof is upon the respondent to prove by a preponderance of the evidence that no default occurred, due to the presumption set forth in W. Va. Code § 29-6A-3(a)(2) that the grievant has prevailed on the merits. See Ehle v. Bd. of Directors, W. Liberty State College, Docket No. 97-BOD-483 (May 14, 1998).

Footnote: 3

Grievant also initially asserted that a default occurred at Level I when the actions required at that level of the grievance procedure did not occur within the required number of calendar days; however, when it was pointed out to her counsel that the grievance procedure statute specifically defines days as working days, this claim was withdrawn.