PAULINE J. BIRMINGHAM,

Grievant,

v. **Docket No. 01-MCVTC-391D**

JAMES RUMSEY TECHNICAL INSTITUTE,

Respondent.

ORDER DENYING DEFAULT

Grievant, Pauline J. Birmingham, employed by the James Rumsey Technical Institute (Institute) as the Director of Finance, appealed to level four on June 11, 2001, alleging that she is entitled to prevail by default because Director James Spears failed to issue a response to their informal conference. A hearing on the issue was conducted in the Grievance Board's Westover office on August 13, 2001. Grievant was represented by Daniel C. Staggers, Esq., and the Institute was represented by David J. Joel, Esq. The parties elected not to file proposed findings of fact and conclusions of law, and the matter became mature for consideration at the conclusion of the hearing.

The essential facts of this matter are undisputed, and are derived from the testimony given by Grievant and Mr. Spears at the hearing.

Findings of Fact

1. Grievant has been employed by the Institute as the Director of Finance at all times pertinent to this grievance. 2. On May 11, 2001, Grievant met with Mr. Spears to discuss her concerns that a teaching position had not been posted as required by law, and the qualifications of the person appointed to the alleged position.

3. Grievant did not advise Mr. Spears at any time during the meeting that this was an informal conference required by the grievance procedure. Grievant did state that she would “probably file a grievance.”

Discussion

The default provision applicable to education personnel grievances is contained in W. Va. Code §18-29-3(a), which states in pertinent part:

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 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 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. Moore v. Dep't of Health and Human Resources, Docket No. 98-HHR-382D (Dec. 8, 1998). A preponderance of the evidence is defined as “evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.” Black's Law Dictionary (6th ed. 1991),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, a party has not met its burden of proof. Id. If a default has occurred, then the grievant wins, and Respondent may request a ruling at level four regarding whether the relief requested should be granted. If a default has not occurred, then the grievant may proceed to the next level of the grievance procedure.

W. Va. Code § 18-29-4(a) states:

(1) Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

The conference with the immediate supervisor concerning the grievance shall be conducted within ten days of the request therefor, and any discussion shall be by the grievant in the grievant's own

behalf or by both the grievant and the designated representative.

(2) The immediate supervisor shall respond to the grievance within ten days of the conference.

Grievant's claim of default is based upon an assertion that there was no timely response given to the informal conference. However, Director Spears testified at level four that he was unaware that his discussion with Grievant was the informal conference as required by the grievance procedure. His recollection was that Grievant indicated she had concerns over the posting, but did not make any reference to a grievance until theconclusion of the discussion when she stated she would “probably file a grievance.” Grievant indicated that she agreed with the Director's recollection.

Grievant had an obligation to inform the administrator that she was invoking the grievance procedure, and that their meeting was the informal conference required by statute. Strother and Knight v. Harrison County Bd. of Educ., Docket No. 01-17-358D (Sept. 11, 2001). “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). In the present matter, Grievant's failure to advise Director Spears that their discussion was the informal conference required by W. Va. Code § 18-29-4, resulted in his failure to issue a response. In addition, since Director Spears apparently did communicate his position to Grievant during the meeting, there was no default, even if he was unaware that Grievant was invoking the grievance procedure. In either case, Grievant has failed to prove by a preponderance of the evidence that a default occurred at the informal conference stage.

Conclusions of Law 1. "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). Harmon and Chiles v. Fayette County Bd. of Educ., 205 W. Va. 125, 516 S.E.2d 748 (S. Ct. 1999).

2. W. Va. Code §18-29-4(a) requires that an informal conference with the immediate supervisor be conducted within ten days of the employee's request, and that a response be made within ten days of the conference.

3. The burden of proof is upon the grievant asserting a default has occurred to prove the same by a preponderance of the evidence. Moore v. Dep't of Health and Human Resources, Docket No. 98-HHR-382D (Dec. 8, 1998).

4. Grievant has failed to prove by a preponderance of the evidence that a default occurred at the informal conference stage of the grievance procedure.

Accordingly, Grievant's request for a determination of default under W. Va. Code § 18-29-3(a) is **DENIED**, and Ordered Dismissed and Stricken from the docket of the Grievance Board. The Grievance Board does not consider this Order to be a final order or decision that can be appealed to circuit court under the provisions of W. Va. Code § 18-29-7.

Date: September 14, 2001 _____

Sue Keller

Senior Administrative Law Judge