RICHARD AKERS,

Grievant,

v.

DOCKET NO. 01-HE-039D

HIGHER EDUCATION INTERIM GOVERNING BOARD/BLUEFIELD STATE COLLEGE,

Respondent.

ORDER DENYING DEFAULT

Grievant, Richard Akers, issued a memorandum to Elizabeth Belcher, Director of Human Resources at Bluefield State College ("BSC") on February 16, 2001, alleging a default on his grievance occurred at level one as of February 13, 2001. On February 21, 2001, Dr. Juanita Loundmon-Clay, Vice President of Student Affairs, and Grievant's immediate supervisor, issued a Level I decision, denying the grievance on the ground that she was unable to grant the relief requested. (*See* Respondent's Exhibit "F"). Thereafter, BSC moved for a stay of the proceedings pending resolution of the default issue, which was granted by Order dated February 19, 2001. The parties subsequently waived the right to a hearing and agreed to submit this matter for a decision based on the Joint Stipulation of Facts (*see* Respondent's Exhibit "E"), written arguments and documents submitted in support hereof. The default issue became mature on April 6, 2001. Grievant appearedpro se, and BSC was represented by Connie A. Bowling, Esq., Senior Assistant Attorney General.

STIPULATION OF FACTS

The parties have stipulated to the following facts:

1. On January 3, 2001, Richard Akers ("Grievant"), the Director of Public Safety at Bluefield

State College ("BSC"), advised Dr. Juanita Loundmon-Clay, the Vice President of Student Affairs at BSC, that a complaint had been filed concerning loud music playing from her on-campus housing.

2. Dr. Loundmon-Clay is Grievant's immediate supervisor.

3. On January 8, 2001, Dr. Loundmon-Clay issued a memo to Grievant, advising him that loud music was not playing from her apartment. Dr. Loundmon-Clay indicated that this was only the latest in a series of memos, which she characterized as "a form of harassment" and asked Grievant to stop sending her memos.

4. On January 12, 2001, Grievant responded with a memo in which he accused Dr. Loundman-Clay of a pattern of attacks upon his character and requested a written apology. In the absence of such apology, Grievant indicated the possibility of legal action. (*See* Respondent's Exhibit "A").

5. On January 30, 2001, Grievant filed a written grievance alleging that Dr. Loundmon-Clay had engaged in a pattern of abusive and defamatory conduct going back to October of 2000, which created a hostile work environment and hindered him in the performance of his job assignments. (*See* Respondent's Exhibit "B"). 6. At the time the grievance was filed, Dr. Loundmon-Clay was out of town conducting BSC business and did not return to BSC until February 5, 2001.

7. On February 6, 8, and 13, 2001, Elizabeth Belcher, Director of Human Resources at BSC, advised Dr. Loundmon-Clay that she believed the last day for responding to the grievance was February 13, 2001.

8. Dr. Loundmon-Clay disagreed with Ms. Belcher's conclusion as to the date on which the time for responding to the grievance expired.

9. February 12, 2001 was the Lincoln's Birthday holiday, a state holiday pursuant to West Virginia Code § 2-2-1 (1998). BSC offices were open and classes were conducted on this day.

10. During the late afternoon of February 13, 2001, Dr. Loundmon-Clay met with Ms. Belcher and discussed asking Grievant to waive the ten-day time period and to agree to meet with Dr. Loundmon-Clay the following day at 10:00 a.m.

11. Grievant inquired why Dr. Loundmon-Clay could not meet with him that afternoon and was told that Dr. Loundmon-Clay had meetings at 3:00 and 3:30.

12. Grievant agreed to meet with Dr. Loundmon-Clay on February 14, 2001 but refused to extend the time frame.

13. Dr. Loundmon-Clay advised Ms. Belcher that she could meet with Grievant at 5:00 p.m. on

February 13, 2001.

14. Grievant responded that he left work at 4:00 p.m. and would not agree to extend the time frame beyond that time.

15. Grievant met with Dr. Loundmon-Clay at 10:18 a.m. on February 14, 2001. 16. On February 16, 2001, Ms. Belcher advised Grievant that she had received a communication from Dr. Loundmon-Clay indicating that the February 14, 2001 meeting was a Level I conference.

17. By memo dated February 16, 2001, Grievant advised Ms. Belcher that he did not consider the February 14, 2001 meeting a Level I conference and that BSC was in default. (*See* Respondent's Exhibit "C").

18. By letter dated February 19, 2001, this matter was referred to this Grievance Board for a default hearing and a stay of any further proceedings below pending the outcome of such hearing.

19. By Order dated February 19, 2001, the motion for stay was granted, and a default hearing was subsequently set for March 14, 2001.

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DISCUSSION

In Syllabus Point 3 of Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997), the Supreme Court stated:

> W. Va. Code § 18-29-3(a)(1992)(Repl.Vol.1994) makes mandatory the time periods within which grievances by educational employees must be filed, heard, and decided. If a grievance evaluator does not comply wit the hearing and decision time periods, and his/her inaction does not come within one of the enumerated statutory exceptions, "the grievant shall prevail by default." W. Va. Code § 18-29-3(a)(1992)(Repl.Vol.1994).

See Harmon v. Fayette County Bd. of Educ., 205 W. Va. 125, 516 S.E.2d 748 (1999); Black v. State Consol. Public Retirement Bd., 202 W. Va. 511, 505 S.E.2d 430 (19998). The grievant asserting that a default has occurred has the burden of proving such default by a preponderance of the evidence. Olson v. Bd. of Trustees/W. Va. Univ., Docket No.95-BOT-081D (Mar. 17, 2000); Thacker v. Bd. of Trustees/Marshall Univ., Docket No. 98- BOT-400 (June 24, 1999). *See* Plumley v. W. Va. Dep't of Natural Resources, Docket No. 00-DNR-091D (June 22, 2000); Wensell v. W. Va. Regional Jail & Correctional Facility Auth., Docket No. 98-RJA-490D (Jan. 25, 1999).

Once it has been determined that the employer has defaulted in processing a grievance pursuant to the provisions of West Virginia Code § 18-29-3, it is presumed that the grievant has prevailed upon the merits of the case unless the employer shows, by clear and convincing evidence, that the remedy requested is contrary to law or clearly wrong. Skeens v. Lincoln County Bd. of Educ., Docket No. 99-22-171 (Aug. 31, 1999). *See* Farley v. Dep't of Transp./Div. of Highways, Docket No. 00-DOH-062D (July 18, 2000). This inquiry includes the employer's assertion that any remedy would be clearly wrong because no default, in fact, occurred at the lower level. Rhodes v. Randolph County Bd. of Educ., Docket No. 00-42-233D (Jan. 17, 2001); Jones v. Dep't of Educ., Docket No. 99-DOE- 495D (Jan. 3, 2000). *See* Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98- T&R-276D (Sept. 30, 1998).

W. Va. Code § 18-29-4(a)(1) provides that "[b]efore a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based . . . the grievant. . . shall schedule a conference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought." The statute further provides that this informal conference "shall be conducted within ten days of the request therefor." *Id.* The immediate supervisor is required to "respond to the grievance within ten days of the conference." W. Va. Code § 18-29-4(a)(2).

First, Grievant asserts that he prevails by default because Dr. Loundmon-Clay did not conduct a timely Level I conference or respond to his January 12, 2001 letter asking for a written apology. In this letter, Grievant stated: "Failure to receive an apology will result in whatever legal actions become necessary to insure that my personal integrity is not compromised."

BSC argues there is no evidence that Grievant's January 12, 2001 letter was intended as the first step in the grievance procedure, and therefore, it cannot be held in default for failing to respond to the letter according to the grievance procedure timelines. I agree with BSC. Grievant's January 12, 2001 letter does not serve to inform Dr. Loundmon-Clay that he is invoking the grievance procedure. His statement that a failure to receive an apology "will result in whatever legal actions become necessary" clearly point to an action that may occur sometime in the future. Grievant has failed to prove by a preponderance of the evidence that his January 12, 2001 letter was the first step in invoking the grievance process; therefore, BSC cannot be held in default for any failure to respond to that letter within the time frames set forth by statute.

Grievant also claims BSC defaulted in processing his January 30, 2001, grievance form in a timely

manner. BSC concedes that the filing of the written grievance form on January 30, 2001 put it on notice that Grievant was invoking the grievance procedure. Even though there is no evidence that Grievant requested an informal conference afterwards, Dr. Loundmon-Clay ultimately attempted to schedule one before the end of the ten-day period specified in W. Va. Code § 18-29-4(a)(1). When it appeared that a conference could not be scheduled before that time, Dr. Loundmon-Clay asked Grievantto extend the time for conducting the informal conference until the following morning. When Grievant refused to grant the extension, Dr. Loundmon-Clay offered to conduct the conference at 5:00 p.m., but Grievant refused. The conference was ultimately conducted at 10:00 a.m. the following morning. Grievant alleges he has prevailed by default by Dr. Loundmon-Clay's failure to respond to his written grievance form within the ten-day statutory period.

The time periods in the grievance procedure are not jurisdictional in nature and can be waived by the parties. W. Va. Code § 18-29-3(a). *See* Plumley v. W. Va. Div. of Natural Resources, Docket No. 00-DNR-091D (June 22, 2000); Skeens v. Lincoln County Bd. of Educ., Docket No. 99-22-171 (Aug. 31, 1999); Jackson v. Hancock County Bd. of Educ., Docket No. 99-15-081D (May 5, 1999). A party 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. 000-42-233D (Jan. 17, 2001); Jones v. Dept. of Educ., Docket No. 99-DOE-495D (Jan. 3, 2000); Lambert v. W. Va. Dept. of Health & Human Res., Docket No. 99-HHR-326D (Oct. 14, 1999).

In this instance, 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 with Dr. Loundmon-Clay on February 13, 2001, at 5:00 p.m. To hold BSC 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. ofDirectors/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).

Accordingly, Grievant's claim for default is **DENIED**, and this case is remanded to BSC for scheduling of a level two evidentiary hearing.

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MARY JO SWARTZ

Administrative Law Judge

Dated: May 3, 2001