KIM THOMAS,

Grievant,

v. DOCKET NO. 01-CCHD-422D

CLAY COUNTY HEALTH DEPARTMENT,

Respondent.

ORDER DENYING DEFAULT

Grievant, Kim Thomas, filed two grievances against her employer, the Clay County Health Department ("CCHD") on February 7, 2001, and May 10, 2001. Her first Statement of Grievance reads:

> **I am hereby grieving the fact that I have been subjected to a continuing pattern of harassment by Karen Dawson, Administrator. The most recent incident took place on January 29, 2001.**
>
> **Relief Sought: For the harassment to cease and desist and to make me whole in any other way.**

The second Statement of Grievance reads:

> **I believe that the actions of management toward me are in retaliation for filing a previous grievance and for a request for information that I gave to the Board of Clay Co. Health Dept. The retaliatory actions included being treated in an unprofessional and disrepect[ful] manner by another employee in the presence of the Board and another employee.**
>
> **Relief Sought: That this behavior cease immediately, that the Employer take necessary steps to ensure that this type of action does not occur in the future and I be made whole in all ways as a result of this inappropriate behavior.**

Grievant filed a default claim on both grievances to Level IV on July 9, 2001. A hearing on the issue of default was held on July 31, 2001. This action became mature fordecision on that date, as the parties elected not to file proposed findings of fact and conclusions of law. **(See footnote 1)**

Issues and Arguments

Grievant alleges a default occurred in the first grievance because CCHD failed to schedule a Level III hearing in a timely manner. Grievant asserts a default occurred in the second grievance because Respondent failed to issue a written response after the Level I conference. Grievant also argues the relief sought should be ordered without further consideration, as Respondent did not request a Level IV default hearing.

Respondent argues a default did not occur in the first grievance because Grievant never perfected her appeal to Level III. Respondent also maintains no default occurred in the second grievance at Level I for two reasons: 1) it was not a grievance, and 2) because the issue was resolved, and the relief Grievant sought was granted, there was no need for a written response. Respondent stated it did not request a Level IV hearing as is was not in default, and Grievant could and did request such a hearing.

After a detailed review of the record in its entirety, the undersigned Administrative Law Judge makes the following Findings of Fact.

Findings of Fact

1. The first grievance was filed on February 7, 2001, and was received by Grievant's supervisor, Karen Dawson on February 8, 2001.

2. On February 8, 2001, Ms. Dawson informed Grievant by letter she could

meet with her on February 13, 2001, for a Level I conference. The Level I conference was held on this date.

3. On February 21, 2001, Ms. Dawson received a letter from Grievant's representative, Marilyn Kendall, memorializing the February 13, 2001 conference, stating what actions the parties would take next, and asking for the grievance to be held in abeyance for thirty days.

4. On March 23, 2001, Ms. Dawson received another letter from Ms. Kendall asking for a follow-up meeting.

5. On April 18, 2001, the parties met to discuss the progress toward possible settlement of the grievance.

6. By letter from Ms. Kendall dated April 24, 2001, Ms. Dawson was informed that after careful consideration, Grievant could not agree with Ms. Dawson's proposed offer. Ms. Kendall stated Grievant wished to proceed with her grievance, and she asked that a written decision be issued within six days of the receipt of the letter. Ms. Kendall stated if Grievant was not satisfied with the written response, she would then file to the next level. Since Ms. Dawson was both the immediate supervisor and the agency head, Ms. Kendall asked who should be contacted to file an appeal to the next level. 7. Ms. Dawson responded by letter dated April 30, 2001, reiterating her settlement offer and directing Grievant to file with Mary Lou Devlin, the Chairperson of the Clay County Board of Health, if she wished to pursue her grievance to Level III.

8. Grievant sent a letter dated May 8, 2001, to Ms. Dawson which stated in its entirety, "I would like to take the enclosed grievance to the next level." A copy of the grievance form was included.

9. Grievant was told by her representative that she should file the grievance with Ms. Dawson and Ms. Dawson would take it to the next level.

10. Grievant did not inform Ms. Dawson of her representative's belief, or that

she wished Ms. Dawson to consider this letter as filing to Level III.

11. Ms. Dawson did not view this letter as filing a Level III appeal, as she had directed Grievant to file with Ms. Devlin. Ms. Dawson believed Grievant was merely informing her that she was going to pursue her grievance at Level III.

12. Grievant had filed a prior grievance approximately three years ago which had proceeded to Level III. At that time, Grievant had a hearing before the Clay County Board of Health. Ms. Dawson was not the agency head during the time of this grievance.

13. On May 10, 2001, Grievant filed her second grievance. Ms. Dawson did not receive this grievance until May 17, 2001. (See footnote 2)

14. After receiving this grievance, Ms. Dawson contacted the Division of Personnel, and talked to Joe Smith, former Acting Director of the Division of Personnel. Ms. Dawson informed Mr. Smith that the person Grievant was complaining about was not part of management, and she did not know how she should proceed with the situation.

15. Mr. Smith informed Ms. Dawson that an employee could not file a grievance against a co-worker, but that Ms. Dawson should address the problem and meet with the employees to resolve the troubling issues.

16. On May 18, 2001, Ms. Dawson informed Grievant she could meet with Grievant and the co-worker, Linda Klotzbach, on May 22, 2001, if this was a good time for her.

17. During this meeting, Grievant did not object to Ms. Dawson's characterization that this could not be a grievance, and that it would not be considered as such because it was directed at a co-worker, not a member of management.

18. The meeting did not take place until May 23, 2001. At this meeting, Grievant was informed she could not file a grievance against another employee,

and Ms. Dawson clarified for Grievant that Ms. Klotzbach was not a member of management. Ms. Dawson also apologized to Grievant for a prior remark she had made even though Grievant had not addressed this statement in her grievance. A discussion was held about the confrontation between Grievant and Ms. Klotzbach. All agreed the situation had gotten out of hand and would not recur. Ms. Dawson believed the situation was resolved.

19. Ms. Dawson did not follow up this conference with a written response because she did not believe it was necessary. Ms. Dawson believed the issues had been resolved, and as Grievant could not file a grievance against another employee, there wasno response needed. Ms. Dawson did write a memo to her files about the meeting, what had occurred, and what had been resolved. Resp. Ex. No. 4, at Level IV.

20. Ms. Klotzbach is not a member of management. Her class specification is Office Manager and she supervises no one. Her major duties are paying the bills. (See footnote 3)

21. Ms. Kendall wrote Ms. Devlin on June 7, 2001, informing her Respondent was in default on both grievances. Ms. Kendall stated Respondent had failed to schedule a Level III hearing in a timely manner, and had failed to issue a written Level I response in the second grievance.

22. Ms. Devlin responded to this notice on June 18, 2001, stating she was scheduling the grievance for Level III hearing on July 11, 2001, if that time would be convenient. (See footnote 4)

23. On June 25, 2001, Ms. Dawson wrote Grievant, attaching a copy of the memo she had written memorializing the May 23, 2001 meeting. Ms. Dawson again informed Grievant that she did not consider this a grievance because a grievance could not be filed against a co-worker. (See footnote 5) **Ms. Dawson also stated at the end of the meeting that the issues discussed had been resolved. 24. On**

June 28, 2001, Mr. Church wrote this Grievance Board alleging default in both grievances and stating that since Respondent had not requested a Level IV hearing, the relief should be ordered.

Discussion

The issue of default in grievances filed by state employees is within the jurisdiction of the Grievance Board. W. Va. Code § 29-6A-3(a) states the following:

> **(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 the 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.**

In addition, House Bill 4314 added the following language to W. Va. Code § 29-6A- 5(a): "[t]he [grievance] board has jurisdiction regarding procedural matters at levels two and three of the grievance procedure."

Because Grievant is claiming a default occurred under the statute, she bears the burden of establishing such default by a preponderance of the evidence. Friend v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-346D (Nov. 25, 1998). A preponderance of the evidence is generally recognized as evidence of greater weight, orwhich is more convincing than the evidence which is offered in opposition to it. Hunt v. W. Va. Bureau of Employment Programs, Docket

No. 97-BEP-412 (Dec. 31, 1997); Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). Where the evidence equally supports both sides, the party bearing the burden has not met its burden. Id.

If a default occurs, Grievant is presumed to have prevailed. W. Va. Code § 29-6A- 3(a)(2); Carter v. W. Va. Div. of Corrections, Docket No. 99-CORR-147D (June 4, 1999); Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D2 (Jan. 6, 1999). Of course, if CCHD can demonstrate a default has not occurred, or can demonstrate it was prevented from meeting the timelines for one of the reasons listed in W. Va. Code § 29-6A- 3(a), or the remedy requested is either contrary to law or clearly wrong, Grievant will not receive the requested relief. W. Va. Code § 29-6A-3(a)(2); Carter v. W. Va. Div. of Corrections, Docket No. 99-CORR-147D (June 4, 1999); Williamson v. W. Va. Dep't of Tax & Revenue, Docket No. 98-T&R-275D2 (Jan. 6, 1999). If there is no default, Grievant may proceed to the next level of the grievance procedure.

This Grievance Board has clarified in its procedural rules the method by which parties may seek default and subsequent relief with the Board at

> **156 C.S.R.1 5.1.**
>
> **5.1. A grievant seeking to prevail by default must file a written claim seeking relief by default with his or her employer and may, at the same time, file the claim with the Board. After the employer receives the written claim for default, it may file a request for a hearing with the Board within five working days. Upon receipt of a claim for relief by default, the Board will place the claim for default on its docket, assign a docket number, and set the claim for hearing. The issues to be decided may include whether a default has occurred at Levels One, Two or Three, whether the employer has a statutory excuse for not responding within the time required by law and/or whether therelief sought is contrary to law or clearly wrong. Once a grievant files a written claim for relief by default with the Board at Level Four, all proceedings at the lower levels are automatically stayed until all default matters have been ruled upon at Level Four, unless all parties agree in writing that lower level proceedings can go forward. Mediation services shall continue to be available while default matters are pending.**

The first issue to address is Grievant's argument that Respondent is not allowed to contest the default because it did not request a Level IV hearing, and the correct course of action is to order the relief sought. Grievant's contention must be rejected for several reasons.

When default is claimed, the Grievance Board is required to follow its own procedural rules, just like any other agency, in dealing with the issue. The Grievance Board has stated in it rules that either party may file a default at Level IV, and once this occurs the first order of business is to assess whether a default occurred. This first step takes place no matter which party has filed at Level IV. If it is determined a default did occur, the second step is to assess whether the employer was prevented from responding "as a result of sickness, injury, excusable neglect, unavoidable cause or fraud." If Respondent cannot offer an acceptable excuse, then the third step is to assess whether "the relief sought is contrary to law or clearly wrong."

The rule states once a grievant files a default claim, this is the procedure that is to be followed. This procedure is consistent with a long line of cases of permitting employees to bring such matters to the Grievance Board for resolution rather than being compelled to go to circuit court. Further, there is no language in W. Va. Code § 29-6A-3(a) mandating an employer must request a hearing or lose the entire grievance as a matterof law. Additionally, given the specific facts of these grievances, it was reasonable for the employer not to request a default hearing at Level IV.

The next issue to decide is whether a default occurred in either grievance. The February 7, 2001 grievance will be discussed first. W. Va. Code § 29-6A-4 (c) states:

> **Within five days of receiving the decision of the administrator of the**

> **grievant's work location, facility, area office, or other appropriate subdivision of the department, board, commission or agency, the grievant may file a written appeal of the decision with the chief administrator of the grievant's employing department, board, commission or agency. A copy of the appeal and the level two decision shall be served upon the director of the division of personnel by the grievant.**
>
> **The chief administrator or his or her designee shall hold a hearing in accordance with section six [§ 29-6A-6] of this article within seven days of receiving the appeal. The director of the division of personnel or his or her designee may appear at the hearing and submit oral or written evidence upon the matters in the hearing.**
>
> **The chief administrator or his or her designee shall issue a written decision affirming, modifying or reversing the level two decision within five days of the hearing.**

Grievant states Respondent did not schedule a hearing; thus, it is in default. Respondent argues Grievant did not file an appeal to Level III, and that is why a hearing was never scheduled. Grievant asked where to file her Level III grievance, and was told to file with Ms. Devlin. Grievant did not follow the directions she was given, and Ms. Dawson had no reason to believe the note Grievant sent her was an appeal to Level III. This is especially true after Grievant asked for and received directions to file with Ms. Devlin. Given this set of facts, the undersigned Administrative Law Judge cannot find a default occurred in the first grievance.

In the second grievance, Grievant argues a written response was never received after the Level I conference. Grievant is correct. Ms. Dawson did not give Grievant a written response because she had informed Grievant she could not file a grievance against another employee. (See footnote 6) **Ms. Dawson did not believe this was a grievance and so informed Grievant. There was no evidence presented that Grievant took issue or disagreed with Ms. Dawson's explanation or**

assessment at the conference.

Secondly, and perhaps what is more important, Ms. Dawson believed the situation had been resolved through the discussion, and resolution at the lowest possible level is the goal of the grievance procedure. It is clear Ms. Dawson took the complaint seriously and met with Grievant and the co-worker to resolve the matter. Ms. Dawson believed this non-grievance was resolved, and no further action was needed.

In reviewing all the evidence in both default allegations, the undersigned Administrative Law Judge notes the 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 notto 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. Morrison v. Div. of Labor, Docket No. 99- LABOR-146D (June 18, 1999). See also Deel v. Bureau of Employment Programs, Docket No. 00-BEP-256D (Nov. 17, 2000).

If Grievant believed Ms. Dawson's assessment of whether this should be considered a grievance was incorrect, all she needed to do was so inform her. 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. Lambert v. W. Va. Dep't of Health and Human Resources, 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).

Grievant's defense to Respondent's argument is to reiterate Ms. Klotzbach is an administrator and a member of management; thus, Ms. Dawson is wrong in her assessment and a response was required. The evidence is clear, while Ms. Klotzbach's classification specification states she is an Office Manager, she supervises no one and her duties are to "manage" the bills. (See footnote 7) **She has no authority over Grievant or any other worker at CCHD in any way. Given the information and data provided by the parties, to grant default in either one of the grievances would be to raise form over substance and to promote a procedural quagmire.**

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. "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 the 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." W. Va. Code § 29-6A-3(a). See Huston v. W. Va. Dep't of Tax and Revenue, Docket No. 99-

T&R-469D (Feb. 29, 2000).

2. When a grievant files a claim at Level IV and asserts his employer is in default in accordance with W. Va. Code § 29-6A-3(a)(2), the grievant must establish such default by a preponderance of the evidence. Once the grievant establishes a default occurred, the employer may show it was prevented from responding in a timely manner as a direct result of sickness, injury, excusable neglect, unavoidable cause, or fraud. See W. Va. Code § 29-6A-3(a)(2); Friend v. W. Va. Dep't of Health & Human Resources, Docket No. 98-HHR-346D (Nov. 25, 1998), aff'd, Civil Action No. 99-AA-8 (Cir. Ct. of Kanawha County Oct. 12, 1999). 3. This Grievance Board has clarified in its procedural rules the method by which parties may seek default and subsequent relief with the Board at

> **156 C.S.R.1 5.1.**
>
> **5.1. A grievant seeking to prevail by default must file a written claim seeking relief by default with his or her employer and may, at the same time, file the claim with the Board. After the employer receives the written claim for default, it may file a request for a hearing with the Board within five working days. Upon receipt of a claim for relief by default, the Board will place the claim for default on its docket, assign a docket number, and set the claim for hearing. The issues to be decided may include whether a default has occurred at Levels One, Two or Three, whether the employer has a statutory excuse for not responding within the time required by law and/or whether the relief sought is contrary to law or clearly wrong. Once a grievant files a written claim for relief by default with the Board at Level Four, all proceedings at the lower levels are automatically stayed until all default matters have been ruled upon at Level Four, unless all parties agree in writing that lower level proceedings can go forward. Mediation services shall continue to be available while default matters are pending.**

4. Once a default is filed, the Grievance Board is required to follow its rules and regulations in resolving the issue.

5. Given the set of facts presented here, no default occurred in either the first grievance or the second "grievance."

Accordingly, Grievant's request for relief by default is DENIED, and both these grievances are remanded for timely Level III hearings on their merits. Grievant, by the filing of her default claim on the second grievance, has informed Respondent of her disagreement with Respondent's assessment that the second issue cannot be considered a grievance.

JANIS I. REYNOLDS

Administrative Law Judge

Dated: September 26, 2001

Footnote: 1

At Level IV, Grievant was represented by Kevin Church of the AFSCME/WVSEU, and Respondent was represented by Attorney Mark Dellinger. At Levels I and II, Grievant was represented by Marilyn Kendall of the AFSCME/WVSEU

Footnote: 2

No reason was by offered by the parties as to why it took so long for Ms. Dawson to receive this grievance. Since this issue was not raised as a problem by the parties, it will not be addressed further.

Footnote: 3

At some point in time, prior to Ms. Dawson's tenure, a management person may have indicated questions should come to Ms. Klotzbach in the Director's absence. There was no evidence to support Grievant's contention that Ms. Klotzbach is a member of management. Grievant agreed Ms. Klotzbach does not supervise anyone.

Footnote: 4

Grievant did not attend this hearing and informed Respondent she would not do so because of the pending default issues.

Footnote: 5

Grievant continued to argue at Level IV that Ms. Klotzbach was an administrator; thus, she could file a grievance against her.

Footnote: 6

It should be noted that employers have a duty to protect their employees from harm from a co-worker, and

the advice received from Mr. Smith, while generally appropriate, may not always be the correct answer.

Footnote: 7

Ms. Dawson noted the class specification did not fit Ms. Klotzbach duties very well.