SCOTT BEANE,

Grievant,

v. **Docket No. 02-20-255D**

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent.

ORDER DENYING DEFAULT

On August 13, 2002, Grievant notified his employer, Respondent Kanawha County Board of Education ("KBOE"), that he believed it was in default. On August 19, 2002, KBOE requested a hearing at Level IV on the default claim. A Level IV hearing was held on September 18, 2002, for the purpose of taking evidence on the issue of whether a default occurred and whether KBOE had a statutory excuse to the default claim. Grievant was represented by Clarence Basham, and KBOE was represented by James W. Withrow, Esquire. This matter became mature for decision on October 2, 2002, the deadline for submission of written argument.

The following findings of fact are derived from the record developed at the Level IV hearing.

Findings of Fact

1. Grievant is employed by KBOE as a bus operator during the school year. During the summer he is employed by KBOE as a painter.

2. Grievant's supervisor when he is working as a bus operator is Judy Rhodes. Grievant's supervisor during the summer when he is working as a painter is Ronald Thomas.

3. Grievant applied for a position as a full-time painter.

4. Grievant was told on June 12, 2002, that he was not going to be selected for the painter position. He spoke with several people during the summer regarding the painter position, including KBOE's counsel, James Withrow, Karen Williams in Human Resources, Jeff Allred, who appears to be Mr. Thomas' supervisor, and Superintendent Ron Duerring.

5. The painter position was awarded to another applicant on July 23, 2002, and Grievant became aware of this. Grievant spoke to Mr. Thomas that day about the position. Mr. Thomas told him he did not have any say in who was selected for the position. Grievant did not tell Mr. Thomas that he considered this to be an informal grievance conference.

6. On July 25, 2002, Grievant handed Mr. Thomas a grievance form utilized by KBOE personnel. Grievant had completed part 1 of the form, which is entitled, “request for informal conference prior to filing grievance.” Mr. Thomas told Grievant the selection was not within his control, and he could not help him. Grievant told him he was going to pursue the grievance. Mr. Thomas told Grievant he would take the grievance form to Mr. Allred. Later Grievant asked Mr. Thomas if he had given the grievance form to whoever was supposed to get it, and Mr. Thomas told him he had done so.

7. Mr. Thomas took the grievance form to Mr. Allred a couple of days after Grievant had given it to him, and told him he was giving it to him because he could not do anything to help Grievant, and he thought maybe Mr. Allred could do something with it.

8. On August 8, 2002, Grievant asked Mr. Thomas if he had heard anything on the grievance, and Mr. Thomas told him, “no, not yet.”

Discussion

The burden of proof is upon the grievant who claims a default to prove by a preponderance of the evidence that a default has occurred. Donnellan v. Harrison CountyBd. of Educ., Docket No. 02-17-003D (June 6, 2002). Where Respondent asserts a statutory excuse to the default, the burden of proof is upon Respondent to prove the same by a preponderance of the evidence.

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.

Effective July 1, 1998, W. Va. Code § 18-29-5 was amended to provide that the Grievance Board "shall administer the grievance procedure at levels two, three and four, . . . as provided for in section four of this article . . .." Based upon this provision, the Grievance Board now has jurisdiction to hear an education employee's default claim, when the default occurs at levels two or three. Jackson v. Hancock County Bd. of Educ., Docket No. 99-15-081D (May 5, 1999). However, the default here is alleged to have occurred at Level I. Nonetheless, "should the employer appeal the employee's default declaration on the narrow grounds that the remedy received is contrary to law or clearly wrong, this Grievance Board has jurisdiction to decide such an appeal. Gruen v. Bd. of Directors,Docket No. 94-BOD-256 (Nov. 30, 1994); Wadbrook v. W. Va. Bd. of Directors, Docket No. 93-BOD-214 (Aug. 31, 1993); Flowers v. W. Va. Bd. of Trustees, Docket No. 92-BOT-340 (Feb. 26, 1993)." Ehle v. Bd. of Directors, Docket No. 97-BOD-483 (May 14, 1998). This includes a contention by the employer that "any remedy would be clearly wrong because, in fact, no default occurred at the lower levels of the grievance procedure." Id.

Grievant argued a default occurred when his supervisor did not provide him a written response to his grievance within 10 days of the date it was filed. He also pointed to the response of his supervisor to his default claim, and argued it was an admission of default, and that should end any further inquiry. The written response reads, “Mr. Beane was not responded to in the 10 days required due to mistake in processing of the form.”

Respondent argued the meeting which occurred between Mr. Thomas and Grievant on July 25, 2002, was an informal conference. Mr. Thomas gave a verbal response to Grievant at that time, that he had no role in the selection and could not help him, and no written response was required.

W. Va. Code § 18-29-4(a) provides as follows regarding the grievance procedure at Level I and at the informal conference stage:

> (a) Level one.

> (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.
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> 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.
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> (2) The immediate supervisor shall respond to the grievance within ten days of the conference.
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> (3) Within ten days of receipt of the response from the immediate supervisor following the informal conference, a written grievance may befiled with said supervisor, or in the case where the grievance involves an event under the jurisdiction of a state institution of higher education, the grievance shall be filed with said supervisor and the office of personnel, by the grievant or the designated representative on a form furnished by the employer or agent.
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> (4) The immediate supervisor shall state the decision to such filed grievance within ten days after the grievance is filed.

Further, W. Va. Code § 18-29-3(i) provides:

> Except for the informal attempt to resolve the grievance as provided for in subsection (a), section four of this article, decisions rendered at all levels of the grievance procedure shall be dated, shall be in writing setting forth the decision or decisions and the reasons therefor, and shall be transmitted within the time prescribed to the grievant and any representative named in the grievance. If the grievant is denied the relief sought, the decision shall include the name of the individual at the next level to whom appeal may be made.

Respondent did not question whether a default could occur at the informal conference stage. This Grievance Board has found that a default may occur at this stage of the procedure. Wounaris v. Bd. of Directors, Docket No. 99-BOD-033D (May 18, 1999).

"[T]he grievance procedure requires a conference with the immediate supervisor prior to filing the grievance, which is to be initiated by the grievant, not by him." Tignor, et al., v. Dep't of Educ., Docket No. 99-DOE-468D (Dec. 30, 1999). Although Grievant was not sure whether he should discuss his

grievance with Mr. Thomas or Ms. Rhodes, Respondent did not question Grievant's decision to go to Mr. Thomas. Grievant gave Mr. Thomas a grievance form which indicated on its face that Grievant was requesting an informal conference. Mr. Thomas spoke with Grievant about the grievance, and verbally responded that he could not do anything about the problem. Grievant said he was going to pursue the grievance. Mr. Thomas told Grievant he would give the grievance form to Mr. Allred. Grievant did not sign the grievance form stating he wanted to go to either Level I or Level II. The form still had Grievant's statement of grievance under the request for an informal conference when Mr. Allred received it. This would certainly lead to some confusion on everyone's part about what was supposed to occur next. Mr. Thomas gave a timely verbal response to Grievant's request for an informal conference that he could not do anything about the selection, but he would take the matter to Mr. Allred. A written response is not required at the informal conference stage of the grievance procedure. If Grievant was not happy with this response, it was then Grievant's responsibility to advance the grievance, not his supervisor's. Deel v. Bureau of Employment Programs, Docket No. 00-BEP-256D (Nov. 17, 2000). A default does not occur when a supervisor does not submit a grievance form to the next level of the grievance procedure on behalf of a grievant, even if the supervisor has stated he will do so. Id. It appears that neither Grievant nor Mr. Thomas understood the grievance procedure, and that Mr. Thomas was doing what he thought was the best thing to do to help Grievant with his problem. Grievant did not properly advance his grievance, as he did not complete the portion of the grievance form to file the grievance at Level I, nor did he sign the form indicating he was waiving Level I and appealing to Level II. While Grievant is claiming a default at Level I, it is clear he was not waiting on a response from Mr. Thomas. Mr. Allred is not designated by the grievance procedure statute as someone who is required to respond at any level. Level I requires a conference with and response from the immediate supervisor, and Level II involves an appeal of the written Level I decision to the county superintendent, and a formal hearing. W. Va. Code § 18-29-4.

> 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)("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. County Bd. of Educ., 201 W. Va. 305, 316, 496 S.E.2d 447 (1997).

No default occurred at Level I, as the grievance had never been advanced to the formal filing stage.

The following Conclusions of Law support the decision reached.

Conclusions of Law

1. The burden of proof is upon the grievant who claims a default to prove by a preponderance of the evidence that a default has occurred. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002). Where Respondent asserts a statutory excuse to the default, the burden of proof is upon Respondent to prove the same by a preponderance of the evidence.

2. "[T]he grievance procedure requires a conference with the immediate supervisor prior to filing the grievance, which is to be initiated by the grievant, not by him." Tignor, et al., v. Dep't of Educ., Docket No. 99-DOE-468D (Dec. 30, 1999).

3. Mr. Thomas timely verbally responded to the grievance at the informal conference stage.

4.

W. Va. Code § 18-29-4(a)(3) provides that:

> Within ten days of receipt of the response from the immediate supervisor following the informal conference, a written grievance may be filed with said supervisor, or in the case where the grievance involves an event under the jurisdiction of a state institution of higher education, the grievance shall be filed with said supervisor and the office of personnel, by the grievant or the designated representative on a form furnished by the employer or agent.

5. It was grievant's responsibility to advance the grievance, not his supervisor's. Deel v. Bureau of Employment Programs, Docket No. 00-BEP-256D (Nov. 17, 2000).

6.

> 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. County Bd. of Educ., 201 W. Va. 305, 316, 496 S.E.2d 447 (1997). 7. No default occurred at Level I, as the grievance was not formally filed at Level I.

Accordingly, the default claim is **DENIED**. If Grievant wishes to pursue his selection grievance, he has fifteen days from receipt of this Order to file his grievance at Level I.

BRENDA L. GOULD

Administrative Law Judge

Dated: October 21, 2002