JOHN COLLINS,

Grievant,

v.

Docket No. 02-DOH-149D

DEPARTMENT OF TRANSPORTATION/

DIVISION OF HIGHWAYS,

Respondent.

ORDER DENYING DEFAULT

John Collins attempted to file a Grievance on April 8, 2002, stating:

> Discrimination in Pay: Pay in Lincoln Co. is [too] widespread among the same classes. Same pay for the same work. There is close to 5 dollars difference between the highest and lowest paid personnel in this county and this needs to be fixed.

Grievant thereafter filed with his employer an undated notice stating, “Due to time limits required by state law, this Grievance is in default by the employer.” Respondent filed its Request for Hearing on Default Claim at Level IV on May 22, 2002.

A Level IV default hearing was held on June 27, 2002, before the undersigned Administrative Law Judge, at the Grievance Board's Charleston office (See footnote 1). Grievant appeared with his representative, Roger Sowards, and Respondent was represented by BarbaraBaxter, Esq. The parties elected to file proposed findings of fact and conclusions of law by July 19, 2002, whereupon the matter became mature for decision. The following Findings of Fact pertinent to resolution of this matter have been determined based upon a preponderance of the credible evidence of record.

FINDINGS OF FACT

1. Grievant attempted to file a grievance on April 8, 2002. The grievance alleged discrimination in pay.

2. Grievant's representative at first attempted to file the grievance directly to Level II, by delivering it to Barbara King, a secretary in the District Engineer's Office.

3. Ms. King, whose duties include processing grievance forms that are filed at Level II, reviewed the form and returned it, advising Grievant's representative it must be filed with Grievant's immediate supervisor at Level I.

4. Grievant and his representative twice more attempted to bypass Level I and file the grievance at Level II, ignoring Ms. King's clear instructions. Ms. King even gave Grievant a copy of the Grievance Code detailing the filing procedure, and advised Grievant that his supervisor could waive Level I. Ms. King finally sent a copy of the grievance form to Grievant's supervisor.

5. Ms. King is not a Grievance Evaluator and is not in Grievant's administrative chain of command.

6. Larry Pauley is Grievant's immediate supervisor. He has no control over the rates of pay of his supervisees, except that he occasionally recommends employees for merit pay increases. He has no input on the salaries of other employees in the county that he does not supervise. 7. Larry Pauley denied the grievance at Level I on its merits.

8. A Level II conference was held on April 30, 2002, after which the grievance was denied.

9. Grievant filed his default claim after the Level II conference.

DISCUSSION

Grievant asserts that a Level II conference should have been scheduled and held within five days of his first attempt to file at Level II, because Ms. King was not a person designated by District Engineer Wilson Braley to decide grievance matters.

West Virginia Code § 29-6A-3(a) states in part: “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.” If a default has not occurred, the grievant may proceed to the next level of the grievance procedure. Pennington v. W. Va. Div. of

Corrections/Anthony Correctional Center, Docket No. 01-CORR-011D (Feb. 13, 2001). Grievant bears the burden of establishing default by a preponderance of the evidence. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002).

Grievant's claim must fail because Grievant caused the error he complained of. He claimed his grievance was not processed timely after his initial attempt to file it, but his attempt to bypass Level I and file directly at Level II was not procedurally correct. He was properly instructed to file it at Level I, and he repeatedly ignored this instruction.

W. Va. Code § 29-6A-4(a) states in part:

> Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant. . . . If a grievance alleges discrimination or retaliation by the immediate supervisor of the grievant, the level one filing may be waived by the grievant and the grievance may be initiated at level two with the administrator or his or her designee, within the time limits set forth in this subsection for filing a grievance at level one. A meeting may be held to discuss the issues in dispute, but the meeting is not required.

Grievant argues that his grievance did allege discrimination, so it was permissible for him to bypass Level I. However, Grievant must read the entire proviso on which he relies, and he ignores the phrase “by the immediate supervisor of the grievant.” Grievant does not allege discrimination by Mr. Pauley, but makes a very broad allegation concerning pay differences within job classifications. Therefore, he may not unilaterally bypass Level I.

This Grievance Board has held:

> 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).)."

Gerencir v. Kanawha County Bd. of Educ., Docket No. 01-20-500D (Nov. 30, 2001), citing Hanlon v. County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997). Grievant's failure to properly file his claim is the reason Respondent did not make a Level II response afterhe did so. Respondent had no

obligation to make a response to an improperly-filed grievance.

Grievant's claim for relief by default is also untimely. While W. Va. Code § 29-6A- 3(a)(2) (recited above) does not specify a time within which one must file a notice of default, the Supreme Court of Appeals of West Virginia has held that, “In order to benefit from the "relief by default" provisions contained in W. Va. Code § 18-29-3(a) (1992) (Repl. Vol. 1994), a grieved employee or his/her representative must raise the "relief by default" issue during the grievance proceedings as soon as the employee or his/her representative becomes aware of such default.” Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997); Harmon v. Fayette County Bd. of Educ., 205 W. Va. 125, 516 S.E.2d 748 (1999). Grievant waited until after receiving an unfavorable Level II decision before claiming a default occurred at Level I. By failing to claim default as soon as he believed it had occurred, he waived his right to do so.

In addition to the foregoing discussion, the following conclusions of law are appropriate in this matter.

CONCLUSIONS OF LAW

1. Grievant bears the burden of establishing default by a preponderance of the evidence. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002).

2. If a default has occurred, a grievant is presumed to have prevailed on the merits of the grievance, and Respondent may request a ruling at Level IV to determine whether the relief requested is contrary to law or clearly wrong. If a default has notoccurred, the grievant may proceed to the next level of the grievance procedure. Pennington, *supra.*

3. In order to benefit from the "relief by default" provisions contained in W. Va. Code § 29-6A-3(a)(2), a grieved employee or his/her representative must raise the "relief by default" issue during the grievance proceedings as soon as the employee or his/her representative becomes aware of such default. Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997); Harmon v. Fayette County Bd. of Educ., 205 W. Va. 125, 516 S.E.2d 748 (1999).

4. Grievant did not give timely notice of the default.

5. W. Va. Code § 29-6A-4(a) states in part:

> Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice

> giving rise to a grievance, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant. . . . If a grievance alleges discrimination or retaliation by the immediate supervisor of the grievant, the level one filing may be waived by the grievant and the grievance may be initiated at level two with the administrator or his or her designee, within the time limits set forth in this subsection for filing a grievance at level one. A meeting may be held to discuss the issues in dispute, but the meeting is not required.

6. Grievant did not allege discrimination by his immediate supervisor, and so was not entitled to unilaterally bypass Level I. Respondent has no obligation to respond to an improperly-filed grievance.

7.

> 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, 438S.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).).

Gerencir v. Kanawha County Bd. of Educ., Docket No. 01-20-500D (Nov. 30, 2001), citing Hanlon v. County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997).

8. Grievant was the cause Respondent's failure to process his grievance immediately after he initially attempted to file it directly at Level II.

Accordingly, Grievant's request for a determination of default under W. Va. Code § 29-6A-3(a) is **DENIED**. This matter is hereby **REMANDED** to Level III for processing at that level, and it is **DISMISSED** and **STRICKEN** from the docket of this Grievance Board.

DATED: August 26, 2002 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1 *A similar default claim was filed in the matter of Dennis Collins, et al. v. W. Va. Dep't of Trans./Div. of Highways, Docket No. 02-DOH-150D, based on a separate grievance but almost identical facts relating to the default claim. Due to the similarity of evidence and witnesses, the default claims were combined for purposes of hearing.*