PATTI BOWLES,

Grievant,

v.

Docket No. 01-DOH-565D

DEPARTMENT OF TRANSPORTATION/
DIVISION OF HIGHWAYS,

Respondent.

ORDER DENYING DEFAULT

Grievant Patti L. Bowles filed two different grievances on October 3, 2001, and October 12, 2001, alleging discrimination in distribution of overtime and failure to award a merit pay increase, respectively. She claims default at Level II for both grievances.

A Level IV default hearing was held on December 17, 2001, before the undersigned Administrative Law Judge, at the Grievance Board's Charleston office. Grievant appeared *pro se*, and Respondent was represented by Jennifer Francis, Esq. The parties elected not to file proposed findings of fact and conclusions of law, and this default claim became mature for decision at the close of the hearing. 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 filed her first grievance on October 3, 2001, alleging that overtime was not equally distributed among secretaries [“First Grievance”]. This grievance was denied at Level I on October 5, 2001, whereupon Grievant that same day submitted a letter to Mr. Carl O. Thompson, Deputy State Highway Engineer, stating in part, “I respectfully request that a Level II informal conference not be

held in this grievance. Please proceed with the Level II decision in order that I may expedite this grievance to Level III."

2. On October 11, 2001, Mr. Thompson delivered a memorandum to Grievant stating, "I am in receipt of your letter, dated October 5, 2001, requesting that the Level II Conference for this grievance be waived and bypassed. Therefore, I am rendering no decision and hereby advise that you may appeal to Level III." Under a line proclaiming, " **Level II Conference & Decision Waived at Request of Grievant:**" (emphasis in original), Mr. Thompson signed the memo. This memo also provided information on to whom the matter should be appealed for a Level III hearing.

3. Grievant acknowledged receipt of the memo by signing it on October 12, 2001, under a line that reads, " **I accept that the Level II Conference and Decision Be Waived.**" However, Grievant wrote the word "Yes" above "Conference" and marked out and wrote "No" over the word "Decision."

4. Grievant filed another grievance on October 12, 2001, alleging that she was not given a merit pay increase although other employees with lesser performance ratings did receive merit pay increases ["Second Grievance"]. 5. This Grievance was denied at Level I on October 19, 2001, and Grievant appealed to Level II on October 22, 2001. Grievant made a request similar to that described in Finding of Fact No. 1 above that the Level II conference be bypassed, although she did not expressly request that a decision be rendered.

6. On October 29, 2001, Mr. Thompson gave Grievant a memorandum that stated, "I am in receipt of your letter, dated October 22, 2001, requesting that the Level II Conference for this grievance be waived and bypassed. Therefore, I am rendering no decision and hereby advise that you may appeal to Level III." Under a line proclaiming, " **Level II Conference & Decision Waived at Request of Grievant:**" (emphasis in original), Mr. Thompson signed the memo. This memo also provided information on to whom the matter should be appealed for a Level III hearing, and was practically identical to the one described in Finding of Fact No. 2 above.

7. Grievant acknowledged receipt of the form by signing it on October 29, 2001, under a line that reads, " **I accept that the Level II Conference and Decision Be Waived.**" However, Grievant wrote the words, "Yes accept" above "Conference" and marked out and wrote "Do not accept" over the word "Decision."

8. On October 29, 2001, Grievant appealed the Second Grievance to Level III, and requested that it be scheduled for hearing along with the First Grievance (See footnote 1). In this letter she also

stated that she did not waive a Level II decision in either grievance, and that she was of the opinion that both grievances were in default at Level II. 9. On November 1, 2001, Grievant submitted a letter to Fred VanKirk, Commissioner of the Division of Highways, stating that she had filed two grievances, and that while she waived a Level II conference in each, she did not waive a Level II decision in either. By this letter she again informed Respondent that she was claiming a default at Level II in each case.

10. On November 8, 2001, Respondent requested a Level IV hearing on Grievant's default claim.

DISCUSSION

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 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 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).

Respondent, appealing to Level IV for a decision that no default has occurred or that any default was excused for one of the reasons contained in West Virginia Code § 29- 6A-3(a), bears the burden of proving its claims by a preponderance of the evidence. See, Ehle v. Bd. of Directors, Docket No. 97-BOD-483 (May 14, 1998); Mullins v. KanawhaCounty Bd. of Educ., 01-20-038D (Apr. 10, 2001); Clifton v. W. Va. Dep't of Health and Human Resources/Bureau for Children and Families, 01-HR-078D (June 1, 2001).

Grievant avers that she properly appealed to Level II, waiving the Level II conference in both grievances, but did not waive Level II decisions. Respondent argues that it was justified in assuming that if Grievant waived the conference, she was waiving the decision at that level as well.

The Level II procedure is outlined in W. Va. Code § 29-6A-4(b), which states:

> Within five days of receiving the decision of the immediate supervisor, the grievant may file a written appeal to the administrator of the grievant's work location, facility, area office, or other appropriate subdivision of the department, board, commission or agency. The administrator or his or her designee shall hold a conference within five

> days of the receipt of the appeal and issue a written decision upon the appeal within five days of the conference.

It is undisputed that Respondent issued no Level II decision for either grievance. Respondent may attempt to show that it was prevented from meeting the statutory time limits “as a result of sickness, injury, excusable neglect, unavoidable cause or fraud” as provided by W. Va. Code § 29-6A-3(a)(2). However, rather than relying on one of these defenses, Respondent contends that it had no duty to issue a decision within five days of a conference that it never held. Respondent also argues that, with respect to the First Grievance, Grievant's default claim is untimely, and should have been raised within five days of when Grievant claims Respondent should have issued a decision.

Grievant unambiguously indicated in her Level II appeal of the First Grievance that she wished to waive the conference, but wanted to have a decision entered, in effectsubmitting the matter for a decision on the record (See footnote 2) , a very common practice. West Virginia Code § 29-6A-3(i) mandates that:

> Decisions rendered at all levels of the grievance procedure shall be dated, in writing setting forth the decision or decisions and the reasons for the decision, and transmitted to the grievant and any representative named in the grievance within the time prescribed. 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.

Several factors mitigate Respondent's failure to issue a Level II decision on the merits, as Grievant requested, and these are sufficient to allow the undersigned to overlook the default in favor of a decision on the merits of Grievant's claim. First is the purpose of the Grievance procedure “to provide a procedure for the equitable and consistent resolution of employment grievances.” W. Va. Code § 29-6A-1. Second is Grievant's own demonstrated preference for having the merits of her arguments considered. Evidence she presented at the Level IV hearing suggests her purpose in bypassing Level II was an impression that grievances were pre-decided at that level and that the conference was considered by Respondent to be a useless formality. (See footnote 3) Too, Respondent's argument that Grievant's claim for relief by default is untimely has some merit. 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). It makes sense that a notice of default under W. Va. Code § 29-6A- 3(a) should also be filed as soon as the Grievant is aware of the default. For the First Grievance, Grievant did not timely give notice of the default.

Finally, Mr. Thompson's Level II responses met the form requirement for a Level II decision, even though they were not characterized as such, Grievant appealed the responses as if they were decisions, and a Level III hearing was scheduled, at least for the First Grievance. At Level II, the Grievance Evaluator is not required to include proposed findings of fact and conclusions of law. The record contains no indication that Grievant felt the First Grievance was in default until she appealed the Second Grievance to Level III.

When Grievant appealed the Second Grievance, she expressly waived the Level II conference, but made no mention of waiving a Level II decision as well. With respect to the First Grievance, Respondent cannot argue that it had no reason to think that Grievant did not want a decision - she expressly requested one. However for the Second Grievance, Respondent was not on notice that Grievant desired a Level II decision on the merits because in this case Grievant did not request a decision until after the Level II response had been issued. 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 laterstage 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). With respect to the second Grievance, Grievant invited the Respondent's failure to issue a Level II decision by failing to request one, and so she is foreclosed from claiming a default in that matter.

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

CONCLUSIONS OF LAW

1. Respondent, appealing to Level IV for a decision that no default has occurred or that any default was excused for one of the reasons contained in West Virginia Code § 29-6A-3(a), bears the burden of proving its claims by a preponderance of the evidence. See, Ehle v. Bd. of Directors, Docket No. 97-BOD-483 (May 14, 1998); Mullins v. Kanawha County Bd. of Educ., 01-20-038D (Apr. 10, 2001); Clifton v. W. Va. Dep't of Health and Human Resources/Bureau for Children and Families, 01-HR-078D (June 1, 2001).

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 not occurred, 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 "reliefby 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. For the First Grievance, Grievant did not give timely notice of the default.

5.

> 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).

6. Grievant failed to request a written Level II decision for the Second Grievance, and so was the cause of Respondent's failure to issue one.

Accordingly, Grievants' 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: January 7, 2002 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1 *It is not clear from the record when the First Grievance was appealed to Level III, but the hearing for that matter was already set when the Second Grievance was appealed.*

Footnote: 2

Although the only record at that time was the Level I decision and Grievant's written argument contained in her request for a Level II decision, this should have been enough material on which the Grievance Evaluator could base a response on the merits of the case.

Footnote: 3

Grievant's job duties involve her in processing grievances for her employer at Levels I and II, and she indicated that it was a common practice to prepare the Level II response in advance of the conference.