JAMES L. FARLEY,

Grievant,

v. **Docket No. 01-32-615D**

MORGAN COUNTY BOARD OF EDUCATION,

Respondent.

ORDER DENYING DEFAULT

Grievant, James L. Farley, formerly employed by the Morgan County Board of Education (MCBE or Respondent) as a principal, alleged a default occurred when he did not receive a response to an informal conference within the statutory time lines. MCBE denies there was a default, but appealed the matter to level four so that its rights would not be prejudiced in any way. A conference call was conducted on January 14, 2001, at which time Respondent's counsel, Claudia W. Bentley of Bowles Rice McDavid Graff & Love, and Grievant's counsel, Garry G. Geffert, agreed to brief the issues of whether Grievant has standing to proceed under the W. Va. Code §§ 18-29-1, et seq. grievance procedure, and whether the Grievance Board has jurisdiction in this matter. The matter became mature for decision upon receipt of reply briefs filed on or before March 25, 2002.

The following facts of this matter are undisputed and may be set forth as formal findings of fact.

Findings of Fact

1. Grievant was employed by MCBE in August 1999, for the position of principal at Berkeley Springs High School (BSHS). Grievant was given a one year contract for the 1999-2000 school year. 2. Grievant was re-employed by MCBE for the 2000-2001 school year, again as principal of BSHS. Grievant was a probationary employee both years he served in this position.

3. On January 3, and again on January 12, 2001, Grievant met with MCBE Superintendent Steven L. Paine, to discuss his compensation for an extracurricular assignment, i.e., performing the duties of principal of the transitional school, and adjustment of his bi-weekly pay to meet the contract rate for the position of principal at BSHS.

4. The matter of the bi-weekly pay was resolved; however, Grievant did not receive compensation for an extracurricular assignment during the remainder of the 2000- 2001 school year.

5. Grievant resigned from his employment with MCBE in July 2001.

6. By letter dated October 30, 2001, Grievant's counsel contacted MCBE regarding the failure to compensate Grievant for work “he performed as principal of the Morgan County transitional school during the 1999-2000 and 2000-2001 school years.”

7. Respondent's counsel responded by letter dated December 3, 2001, advising Mr. Geffert that Grievant was hired as principal at BSHS, with no reference to duties relative to a distinct transitional school, and that no extracurricular contract existed for Grievant. Counsel additionally commented that any claim relating to such an assignment was untimely.

8. In response to Ms. Bentley's letter of December 3, 2001, Mr. Geffert asserted the matter had been timely raised by Grievant on a number of occasions during conferences with Superintendent Paine, but that he had never received a definiteresponse, resulting in a default by MCBE. Stating that the December 3, 2001, letter was the first definitive, negative response to the request for compensation, Mr. Geffert stated that Grievant “hereby files a formal grievance on the issue of his compensation . . . .”

9. Superintendent Paine issued a response dated December 12, 2001, stating that Grievant did not request a level one grievance conference or file a grievance while an employee, and did not have standing to do so at this time. In the alternative, the grievance was deemed untimely filed, and denied.

Discussion

Initially, Respondent argues that the Grievance Board lacks jurisdiction in this matter because no grievance was filed as a matter of law, and without a grievance no appeal can be decided. Grievant offered no response to this argument.

W. Va. Code § 18-29-3(a) provides in relevant part:

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.

The statutory language is clear and unambiguous in giving the Grievance Board jurisdiction over default claims appealed from “any level,” and Respondent has acted consistent with this provision in appealing the default claim to level four. This case isunusual in that a preliminary issue of whether a grievance was actually filed must be addressed as part of the default claim; however, that factor does not affect the jurisdiction of the Grievance Board.

The burden of proof is on a respondent appealing a claim of default to Level IV to prove by a preponderance of the evidence that no default occurred, or that it has a statutory excuse for noncompliance with the statutory time lines, due to the presumption set forth in W. Va. Code § 18-29-3(a) that the grievant has prevailed on the merits. Bloomfield v. Ohio County Bd. of Educ., Docket No. 01-35-554D (Oct. 20, 2001); Jones v. Dep't of Educ., Docket No. 99-DOE-495D (Jan. 3, 2000); Tignor v. Dep't of Educ., Docket No. 99-DOE-468D (Dec. 30, 1999); Ehle v. Bd. of Directors, Docket No. 97-BOD-483 (May 14, 1998).

It should be noted that this 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). The grievance procedure should not become a trap for either the employees or employers, but rather it should work so that disputes are resolved consistently and fairly, as early as possible within the procedure. See W. Va. Code § 18-29-1. Additionally, Spahr, supra, indicates the merits of the case are not to be forgotten. Id. at 743. See Edwards v. Mingo County Bd. of Educ., Docket No. 95-29-472 (Mar. 19, 1996). A default claim is based on the employer's alleged procedural violation of failing to respond to the grievance within the time limits contained in W. Va. Code § 18-29-4. The time limits applicable to level one follow:

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.

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.

(2) The immediate supervisor shall respond to the grievance within ten days of the conference.

(3) 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.

Respondent asserts that no grievance was ever initiated, therefore, there can be no default. Grievant claims that he met with the Superintendent on January 3, and 12, 2001, at which times he "raised the issue of compensation for work at the transitional school . . ." "trigger[ing] the duty of Superintendent Paine to respond to his request within ten days." (See footnote 1) Grievant argues that his failure to use the magic word "grievance," does not change the nature of the proceedings, and that Respondent should have been aware that a grievance was in process. Thus, Grievant concludes, MCBE defaulted when no definitive response was provided until December 3, 2001.

Grievant's claim of default is not supported by the evidence in this matter. First, accepting Grievant's version of the events, there was no informal conference as contemplated by W. Va. Code § 18-29-4(a), with the Superintendent. While he met with the Superintendent on January 3 and 12, 2001, and discussed the issue of additional compensation, Grievant's recollection was that the Superintendent assured him that he would take the steps necessary to obtain the compensation. This constitutes a response although Grievant did not receive any additional remuneration.

Second, since Grievant did not advise Superintendent Paine that the meeting was to be the informal conference of the grievance procedure, and because he left the meeting with an assurance that he would receive the compensation, Respondent would have had no reason to assume the

meeting was part of the grievance process. Grievant is correct that it is not necessary to use “magic words” when initiating a grievance. For example, in Wounaris v. Bd. of Directors/W. Va. State College, Docket No. 99-BOD-033D (May 18, 1999), the Grievance Board held that administrators might reasonably deduce that a grievance would follow in certain situations. Because Mr. Wounaris' employment had been terminated, and he had requested a conference, the ALJ determined that the administratorshould have treated the request as the first step of the grievance procedure, or at the least, should have asked the intent of the employee.

However, when a matter does not involve extraordinary circumstances such as a dismissal, the grievant must advise his supervisor that the conference is to be considered a part of the grievance process. Akers v. Higher Ed, Interim Governing Bd./Bluefied State College, Docket No. 01-HE-039D (May 3, 2001); Della-Giustina v. Bd. of Trustees/W. Va. Univ., Docket No. 99-BOT-272D (Nov. 9, 1999). There is no evidence that Grievant advised Superintendent Paine that the January 12, 2001, meeting was intended to be the informal conference required by the grievance process. A party simply cannot acquiesce to, or be the source of, an error during proceedings, 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).

Third, the undersigned does not accept that Grievant intended the meetings with Superintendent Paine to be part of the grievance process. This conclusion is based upon Grievant's own comments that he relied on the representation of Superintendent Paine that he would receive the compensation, as well as statements of concern regarding filing a grievance while still a probationary employee. Certainly, the allegation that the grievance was begun in January is contradictory to the representation that Grievant did not pursue the matter until after he terminated his employment due to concerns of his probationary status.

Finally, if Grievant had intended the meeting to constitute the statutory informal conference, he was obligated to either proceed with filing at level one, or claiming a default. 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). Grievant offered no explanation for the delay in claiming a default. While it is clear that counsel was obtained

during this period of time, Grievant was obligated to preserve his rights in the interim.

Given the above discussion, a finding of default cannot be made in this case based upon Grievant's failure to advise Superintendent Paine that he wished to begin grievance proceedings with a conference, and his subsequent failure to assert a claim for default, or file a level one grievance, in a timely manner.

Respondent next asserts that an attempt to file a “formal grievance” on December 10, 2001, must fail because Grievant was no longer an employee at that time, and had no standing to grieve. In response, Grievant continues to assert that grievance proceedings were timely initiated in January 2001, within fifteen days of the most recent occurrence of non-payment.

If it should be determined that the January 2001, meeting constituted the informal conference required by the grievance procedure, Grievant was required by the same statutory time lines to proceed by claiming a default, or filing a written level one grievance, when no response was forthcoming in ten days. Grievant's assertion that he had nothing to grieve until he was definitively notified he would not be paid, is erroneous. The grievable event was Respondent's failure to compensate Grievant at the time it was allegedly owed. There is no requirement that a grievant must wait until a decision is issued prior to proceeding to the next level, or claiming default. On the contrary, some action should havebeen taken by Grievant in late January or early February 2001, or at the very latest, within fifteen days of his resignation. W. Va. Code § 18-29-1 provides that the purpose of the statutory grievance procedure is to allow education employees and their employer to reach solutions to problems which arise within the scope of their respective employment relationships. Grievant terminated that employment relationship in July 2001, and in December 2001, no longer had standing to file a grievance under this statutory procedure. See Malcolm v. Monongalia County Bd. of Educ., Docket No. 01-30-593 (Feb. 28, 2002).

In addition to the foregoing findings of fact and discussion, the following formal conclusions of law are appropriate.

Conclusions of Law

1. W. Va. Code §18-29-4(a) requires that prior to a grievance being filed at level one, an informal conference with the immediate supervisor must be conducted within ten days of the employee's request, and that a response be made within ten days of the conference.

2. "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." W. Va. Code § 18-29-3(a). Harmon and Chiles v. Fayette County Bd. of Educ., 205 W. Va. 125, 516 S.E.2d 748 (S. Ct. 1999).

3. The burden of proof is on a respondent appealing a claim of default to Level IV to prove by a preponderance of the evidence that no default occurred, or that it has a statutory excuse for noncompliance with the statutory time lines, due to the presumption set forth in W. Va. Code § 18-29-3(a) that the grievant has prevailed on the merits. Bloomfield v. Ohio County Bd. of Educ., Docket No. 01-35-554D (Oct. 20, 2001); Jones v. Dep't of Educ., Docket No. 99-DOE-495D (Jan. 3, 2000); Tignor v. Dep't of Educ., Docket No. 99-DOE-468D (Dec. 30, 1999);Ehle v. Bd. of Directors, Docket No. 97-BOD-483 (May 14, 1998).

4. Grievant had an obligation to inform the administrator that he was invoking the grievance procedure, and that their meeting was the informal conference required by statute. Strother and Knight v. Harrison County Bd. of Educ., Docket No. 01-17-358D (Sept. 11, 2001). "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. Logan County Bd. of Educ., 201 W. Va. 305, 316, 496 S.E.2d 447, 458 (1997).

5. In order to benefit from the "relief by default" provisions contained in W. Va. Code § 18-29-3(a), 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, supra.

6. Respondent proved by a preponderance of the evidence that no grievance was initiated in January 2001, and, therefore, no default occurred.

7. Grievant was not an employee of MCBE in December 2001, and lacked standing to file a default claim or a level one grievance at that time, under the provisionsof W. Va. Code § 18-29-1. See Malcolm v. Monongalia County Bd. of Educ., Docket No. 01-30-593 (Feb. 28, 2002).

Accordingly, Grievant's claim of default at level one is **DENIED**, and the matter **DISMISSED** from

the docket of the Education and State Employees Grievance Board.

DATE: April 30, 2002 _____

Sue Keller

Senior Administrative Law Judge

Footnote: 1

The record does not include any information regarding the transitional school, the amount of time Grievant allegedly worked there, the nature of his duties, or what hours heworked there.