WILLIAM RAWSON,

Grievant,

v. **DOCKET NO. 03-26-128D**

MASON COUNTY

BOARD OF EDUCATION,

Respondent,

and

DAVID DORST & RICHARD TIBBETTS,

Intervenors.

ORDER DENYING DEFAULT

Respondent Mason County Board of Education, represented by Greg Bailey, Esq. of Bowles Rice McDavid Graff & Love, PLLC, requested a level four hearing on the claim of William Rawson, Grievant, represented by Basil R. Legg, Jr., Esq., that a default had occurred in his grievance at level two. Intervenors David Dorst and Richard Tibbetts, represented by Susan Hubbard of the West Virginia Education Association, were joined as parties by Order dated June 10, 2003.

In a telephone conference held July 9, 2003, the parties (See footnote 1) stipulated to the facts listed herein, and agreed to submit their proposed conclusions of law by July 16, 2003, whereupon the matter became mature for decision.

STIPULATED FINDINGS OF FACT

1. A level two hearing was set in this matter for May 5, 2003. Grievant's representative, Basil R. Legg, Jr., never received written notice of the May 5, 2003 hearing. Respondent was aware that Grievant had retained Mr. Legg as counsel. The written notice to Grievant, dated May 1, 2003, mistakenly listed the hearing date as March 5, 2003.

2. Respondent's counsel, Greg Bailey, spoke with Mr. Legg by telephone on May 2, 2003, and informed him of the May 5, 2003 hearing date. Mr. Legg stated he would not be available on that date due to a schedule conflict and objected to the hearing date, and further asserted that his client was entitled to a hearing within the five-day time limit, which would expire on May 6, 2003.

3. Mr. Bailey being unavailable on May 6, 2003, his co-counsel, Mr. Howard Seufer, agreed to hold the level two hearing on that date, and informed Mr. Legg of the new hearing date.

4. On the morning of May 6, 2003, Mr. Legg left a voice mail message for Mr. Seufer, indicating he was ill and would not be able to attend the level two hearing as scheduled. Grievant appeared at the scheduled time and place for the hearing, which was ultimately continued.

5. On May 8, 2003, (See footnote 2) Grievant's attorney asserted that a default had occurred in the scheduling, notice and holding of a level two hearing.

DISCUSSION

The burden of proof is upon the grievant to prove by a preponderance of the evidence that a default occurred, *i.e.*, the grievance evaluator required to respond to agrievance at a specified level failed to make a required response in the time limits required in this article. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002).

A level two hearing must be held within five days of the filing of the level two appeal. *See*, W. Va. Code § 18-29-4. "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). Grievant argues that Respondent's failure to provide proper written notice to Grievant and Grievant's counsel of the level two hearing, a default occurred. Respondent's argument is that no default occurred because Grievant's counsel was unable to attend the hearing, and that a technical violation of W. Va. Code § 18-29-6, which requires that "Notice of a hearing shall be sent to all parties and their named representative and shall include the date, time and place of the hearing," does not constitute a default.

What happed in this case is Respondent scheduled a hearing within the five-day time limit, sent an erroneous notice of the hearing to Grievant and then called Grievant's attorney to inform him of the hearing date. Grievant's attorney stated he would not be available that day and that Grievant

would not waive the time limits. Since that hearing was day four of the five-day time period, Grievant's attorney left Respondent with no choice but to schedule the hearing on day five. Both Grievant and his attorney were notified of the rescheduled hearing date, and Grievant showed up for the hearing. Grievant's attorney, however, called and left a message on the morning of the hearing and stated he was sick and could not come to the hearing, leaving Respondent with the choice of holdingthe hearing and denying Grievant's right to counsel, or rescheduling the hearing for later, outside the timelines.

___Timelines may be extended by the actions of the grievant and by the agreements of the parties, such as rescheduling of hearing dates beyond the statutory timeframe. Gerencir v. Kanawha County Bd. of Educ., Docket No. 01-20-500D (Nov. 30, 2001); Mullins v. Kanawha County Bd. of Educ., Docket No. 01-20-038D (Apr. 10, 2001). In this case, it was the actions of Grievant's counsel that extended the timelines.

Grievant argues that Respondent's failure to notify both Grievant and his counsel in writing of the hearing date and time constitutes a default. Respondent argues the statute does not require a writing, only that notice be "sent." Neither argument has merit. The default provision only applies when a required response, in this case holding a level two hearing, is not made within the time limits required. No time limit is placed on providing notice of the hearing, so no time limit can be violated for the notice. In any event, both Grievant and his counsel had notice of the proposed hearing dates. While the code does not explicitly state notice must be in writing, that requirement can be inferred by the use of the word "sent," which would require an object to send. Nevertheless, in the absence of bad faith, substantial compliance is deemed acceptable. Duruttya v. Bd. of Educ., 181 W. Va. 203, 382 S.E.2d 40 (1989); Morrison v. Div. of Labor, Docket No. 99-LABOR-146D (June 18, 1999). *See* Deel v. Bureau of Employment Programs, Docket No. 00-BEP-256D (Nov. 17, 2000). Despite the mistaken date in the letter mailed to Grievant and the lack of a writing sent to Grievant's attorney, Respondent substantially complied with the notice requirement, as evidenced by the fact that both Grievant and his attorney had actual notice of both hearing dates. Although Respondent did make some mistakes in providing written notice of the hearing, the reason the hearing was not held within the five-day time limit is that Grievant's counsel could not attend. 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* 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. Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 316, 496 S.E.2d 447, 458 (1997). Grievant has not met his burden of proving a default occurred.

Respondent asserts that Grievant should forfeit his right to prosecute his Grievance as a result of his counsel's "repugnant tactics" that are "the product of improper motive, in the realm of intimidation or harassment." However, the default provision does provide a remedy if a hearing is not held within the time limits, a hearing was not held within the time limits, and Grievant's counsel was marginally within his rights in advocating on his client's behalf by attempting to take advantage of the provision. There was no evidence that Mr. Legg contrived the delay in order to cause a default. 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, *supra*. *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 not to be forgotten. Id. at 743. See Edwards v. Mingo County Bd. of Educ., Docket No. 95-29-472 (Mar. 19, 1996). While Grievant's tactics did contribute to the present procedural quagmire, dismissing the case out of hand would not serve to resolve the merits of the grievance.

The following conclusions of law support this decision:

CONCLUSIONS OF LAW

1. "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).

2. The burden of proof is upon the grievant to prove by a preponderance of the evidence that a default occurred, i.e., the grievance evaluator required to respond to a grievance at a specified level failed to make a required response in the time limits required in this article. Donnellan v. Harrison County Bd. of Educ., Docket No. 02-17-003D (June 6, 2002); Bloomfield v. Ohio County Bd. of

Educ., Docket No. 01-35-554D (Dec. 20, 2001); Birmingham v. James Rumsey Technical Inst., Docket No. 01-MCVTC-391D (Sept. 14, 2001). If the grievant establishes that the required response was not made in a timely manner, Respondent may then show that the delay was due to a statutory excuse of sickness or illness, or that Grievant agreed to waive the time lines. Donnellan, *supra*.

3. Timelines may be extended by the actions of the grievant and by the agreements of the parties, such as rescheduling of hearing dates beyond the statutory timeframe. Gerencir v. Kanawha County Bd. of Educ., Docket No. 01-20-500D (Nov. 30, 2001); Mullins v. Kanawha County Bd. of Educ., Docket No. 01-20-038D (Apr. 10, 2001). 4. A party simply cannot acquiesce to, or be the source of, an error duringproceedings before a tribunal and then complain of that error at a later date. *See* 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. Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 316, 496 S.E.2d 447, 458 (1997).

5. In the absence of bad faith, substantial compliance is deemed acceptable. Duruttya v. Bd. of Educ., 181 W. Va. 203, 382 S.E.2d 40 (1989); Morrison v. Div. of Labor, Docket No. 99-LABOR-146D (June 18, 1999). *See* Deel v. Bureau of Employment Programs, Docket No. 00-BEP-256D (Nov. 17, 2000).

6. Grievant did not meet his burden of proving that a default occurred.

Accordingly, Grievant's request for relief by default is **DENIED**, and this matter is hereby **REMANDED** to level two for further proceedings at that level. Respondent is ordered to hold a level two hearing within five days of receipt of this order, or within such time as is mutually agreed by the parties, in writing. This matter is hereby **DISMISSED** from the docket of the Grievance Board.

Date: July 29, 2003 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

Intervenors participated in the telephone conference by their representative, but had no argument or evidence relative to the issue of whether a default occurred. Intervenors filed no brief on the default issue.

Footnote: 2

This letter was erroneously date April 3, 2003, but the correct date appears in the fax transmittal header at the top of the page.