M. SHARON MALCOLM,

Grievant,

v. **DOCKET NO. 03-BEP-266D**

WORKERS' COMPENSATION COMMISSION/

OFFICE OF JUDGES,

Respondent.

ORDER DENYING DEFAULT

Grievant claims a default occurred in three grievances she filed against her employer, Respondent, the Workers' Compensation Office of Judges (OOJ) (See footnote 1) , and requested a level four determination of default. Her September 3, 2003, "Motion for Acceptance of Level 4 Grievance Hearing" states, "The grievant is seeking a win by default, as the state has been given waivers and extensions of said waivers, waivers ending on August 4, 2003. As to date this grievant has not been given [a] hearing date, in answer to grievance attached, against one Vance Hill Jr. and one Nancy Workman." A level four default hearing was held at the Grievance Board's Charleston Office on October 6, 2003. Grievant appeared *pro se*, and Respondent was represented by counsel, Kelli Talbott, Assistant Attorney General. The matter became mature for decision October 21,2003, the deadline for the parties to file their proposed findings of fact and conclusions of law. (See footnote 2)

Based on a preponderance of the evidence, the following facts have been proven:

FINDINGS OF FACT

1. On May 23, 2002, Grievant filed a complaint with the Equal Employment Opportunity (EEO) office of the Bureau of Employment Programs (BEP).

2. At the time she filed her complaint, Alice McVey, BEP EEO Counselor, advised Grievant that the EEO complaint was not a grievance, and Grievant could file a grievance over the same incidents.

3. On July 23, 2002, Fred Weaver handed Grievant a letter from BEP Commissioner Robert J. Smith. This letter stated that the EEO investigation had been completed and that her allegations had been unsubstantiated. Grievant tossed the letter onto her desk, unopened, and did not read it.

4. On November 6, 2002, Grievant filed at level four a grievance stating, “29-6A Sexual harassment, Discrimination, but not limited to - on Supervisor II Vance Hill, Jr.” As relief, she sought, “Mr. Hill's removal from supervisors position over White woman, Give me, his Title, Position, his salary plus 10% - his office.” This Grievance was remanded back to level two.

5. On November 12, 2002, Nancy Workman met with Grievant for a level two conference, and Ms. Workman issued a level two decision on November 15, 2002, denying the grievance because she was without authority to grant the relief sought. In addition,Timothy G. Leach, Chief Administrative Law Judge, who was present at the conference, advised Grievant in writing that the grievance was untimely “is barred by statute and will not be considered by us.” Respondent's Exhibit No. 5.

6. Grievant did not appeal this grievance to level three.

7. On October 8, 2002, Grievant told Mr. Weaver she had not received notice of the EEO investigation outcome. Mr. Weaver reminded her that he had personally given her the decision, and requested that EEO Counselor Alice McVey give her another copy. Ms. McVey gave a new copy of the decision to Mr. Weaver, who again gave it to Grievant.

8. Grievant, Mr. Weaver and Ms. McVey then met with Grievant, who told them she considered herself served with the decision as of then.

9. On October 9, 2002, Grievant filed two grievances, one designated as “Against Vance Hill Jr.,” and the other “Against Nancy Workman.” The first grievance alleged, in part, “Vance Hill Jr. Supervisor II BEP OOJ has resumed his retaliation on me for filing a complaint on him for previous Sexual Harassment.” The second grievance stated, in part, “I feel that Nancy Workman has shown continued Favoritism to Vance Hill Jr. against me, solely because he is a Black Man in Management. A position needed to meet quotas.”

10. At some point, Grievant noted on the Vance Hill grievance, “I wish to combine this with my EEO Complaint and go to Level (4).” Judge Leach informed Grievant that the EEO Complaint could not be consolidated with the Grievance. Respondent's Exhibit No. 8. The level two decision by Patricia Fink explicitly stated the EEO complaint and the grievance could not be combined, and

reminded Grievant that, at that point, she had no pending EEO complaint, as it had been closed. Respondent's Exhibit No. 11. 11. Both October 9 grievances were denied at level two following separate conferences. Grievant appealed the decision of the Vance Hill Grievance, but did not appeal the Nancy Workman Grievance.

12. Patricia Fink, who conducted the level two conference on the Vance Hill grievance, mistakenly instructed Grievant to file her level three appeal with Judge Leach. Mr. Leach subsequently learned he was not the proper person to hear level three appeals, and informed Grievant, asking her to waive the time frame in which to process her appeal.

13. On November 14, 2002, Grievant signed a waiver that stated, in part, “By mutual agreement of all parties, the time frames are hereby waived as follows: (Explanation and signatures/date of all parties required.” The waiver did not specify a limitation on the waiver. Respondent's Exhibit No. 12.

14. The level three hearing on this grievance was scheduled for January 23, 2003, but was continued at the request of Respondent's counsel. It was rescheduled for March 4, 2003. Grievant did not object to the continuance. The grievance was again continued at the request of Grievance Evaluator Jack McClung, again without objection by Grievant. The level three hearing was then set for May 22, 2003.

15. Prior to the hearing, Grievant approached BEP Commissioner Greg Burton with her concerns about the fairness of the EEO investigation. Mr. Burton ordered a new investigation.

16. In order to allow time for the new investigation, the parties entered into an “Agreement to Continue Level Three Hearing,” stating in part, “The Grievant and Respondent agree to continue the Level Three hearing for a maximum of forty-five (45) days . . . .” This Agreement was signed by the parties on May 22, 2003. Respondent's Exhibit No. 18. 17. As the investigation had not been completed by the end of the 45 days, the investigators requested additional time. The parties entered into a second Agreement, which stated in part, “The Grievant and Respondent agree to continue the Level Three hearing until July 31, 2003 for a final report to be issued by Drema Smith and Dennis Taylor, who have been designated by the Commissioner of the Bureau of Employment Programs to investigate and review the allegations of sexual harassment and retaliation made by the Grievant against Vance Hill, Jr., an employee of the Bureau of Employment Programs. On or before July 31, 2003, the parties shall confer and, if necessary, reschedule the Level Three hearing at a time that is

agreeable and convenient for both parties." Respondent's Exhibit No. 19.

18. Prior to July 31, the investigators requested a few additional days to complete their report. Grievant did not object. The independent investigation report was not completed and delivered until August 5, 2003.

19. On June 24, 2003, attorney Katherine L. Dooley sent a letter to Mr. Burton stating she had been retained by Grievant "to represent her in an action for Sexual Harassment and a hostile work environment." She stated, "It is my understanding that Ms. Malcolm has been attempting to resolve her work difficulties through the administrative grievance process for sometime now without a satisfactory result. . . . Because Ms. Malcolm has not received any relief, she has requested that I pursue this matter on her behalf pursuant to the West Virginia Human Rights Act." On August 8, 2003, Ms. Dooley sent a letter to Workers' Compensation General Counsel T. J. O'Brokta requesting a copy of the investigation report.

20. Grievant's request for a determination of default was received by the Grievance Board on September 4, 2003.

DISCUSSION

___ "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." W. Va. Code § 29-6A-3(a). 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). If the grievant establishes that the required response was not made in a timely manner, Respondent may then show that Grievant agreed to waive the time lines. Donnellan, *supra*.

Grievant's first contention is that all three grievances were consolidated, and thus a default in the October 9 Vance Hill grievance constituted a default of all issues. There is no evidence in the record that such a consolidation occurred at any time. Grievant stated in her proposed Findings of Fact that "all of the above issues were consolidated at the request of Dennis Taylor, investigator appointed by Greg Burton, on June 23, 2003." Part of Grievant's Exhibit No. 1 is an email from Mr. Taylor to

Grievant, that simply says he had been assigned, with Drema Smith "to conduct an independent investigation of matters set forth in your grievance." No mention is made of consolidation, and the term "grievance" is singular. In any event, Mr. Taylor was nothing more than, as he clearly stated, an "independent investigator" working outside the grievance process, and had no power to consolidate grievances. Since two of the grievances had been denied and never appealed, at that point they no longer existed and could not have been consolidated anyway. Forpurposes of this default determination, only the October 9 Vance Hill grievance is still viable, and will be considered.

With respect to that grievance, it is clear the normal timelines had been waived by grievant, in writing. The first waiver was for an indefinite period. Although the form had a space for adding terms or limitations, this space was blank. After a hearing was set, the parties negotiated a second waiver, this time for a limited time of 45 days to allow for an outside investigation of Grievant's claims. When this investigation was not completed, the parties negotiated a third written waiver.

This third waiver, Respondent's Exhibit No. 19, is the point of contention. It contains conflicting language and fails to specify whose responsibility it would be to contact whom, in order to schedule the level three hearing. It first states, "The Grievant and the Respondent agree to continue the Level Three hearing until July 31, 2003 for a final report to be issued by Drema Smith and Dennis Taylor. . . ." This language implies a level three hearing should be held on July 31, 2003. However, the next sentence in the agreement clarifies the intent of the parties: "On or before July 31, 2003, the parties shall confer and, if necessary, reschedule the Level Three hearing at a time that is agreeable and convenient for both parties."

At no time, before or after July 31, 2003, did either party contact the other in order to confer on an agreeable date for the level three hearing. Grievant contends it was Respondent's duty to contact her, Respondent contends nothing in the agreement conferred that responsibility. The specified time limits in the grievance statute may be extended for a "reasonable time" by mutual, written agreement of the parties. Waiver of the strict statutory timelines is a common occurrence within the context of the grievance procedure. Parker v. W. Va. Dep't of Health and Human Resources, Docket No. 99-HHR-296D (Nov. 30, 1999). In this case, Grievant clearly waived the usual timelines for holding a level three hearing, for a specific purpose, and did not in that waiver require that the level three hearing be held on or before a date certain. The July 31, 2003, date was the date the parties expected to receive the investigatory report, not the date by which a hearing must be held. Although

no duty was placed on either party to contact the other to reschedule a hearing, it was clearly intended that this be done after the report was issued.

However, Grievant's retention of counsel complicated and added confusion to matters. Grievant should have had no expectation that Respondent would contact her personally after she retained counsel to pursue her claims in another venue. Ms. Dooley, while not explicitly stating her client no longer wished to pursue the grievance, implied that that action had been abandoned in favor of a Human Rights Act claim. She was in contact with Respondent's general counsel, by phone and by letter, before and after the investigation report was issued, and made no mention of continuing the grievance process. Grievant, for her part, claims the time for holding a level three hearing ended on August 5, 2003, but made no effort to confer on a mutually acceptable date and made no default claim until almost a month later.

In order to benefit from the "relief by default" provisions, the grieved employee must raise the default issue as soon as the employee becomes aware of such default. Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997). Moreover, "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." Rhodes v. Randolph County Bd. of Educ., Docket No. 00-42-133D (Jan. 17, 2001); Lambert v. W. Va. Dep't of Health and Human Resources, Docket No. 99-HHR-326D (Oct. 14, 1999). *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).

Grievant waived the statutory time limit for holding a level three hearing, and contributed to the error of failing to hold a timely hearing through her counsel's implication that the claims would be pursued through an alternate venue. She has not met her burden of proving a default occurred at level three.

The following conclusions of law support this decision:

CONCLUSIONS OF LAW

1. "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." W. Va. Code § 29-6A-3(a). 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 Grievant agreed to waive the time lines. Donnellan, *supra*.

2. The specified time limits in the grievance statute may be extended for a "reasonable time" by mutual, written agreement of the parties. Waiver of the strict statutorytimelines is a common occurrence within the context of the grievance procedure. Parker v. W. Va. Dep't of Health and Human Resources, Docket No. 99-HHR-296D (Nov. 30, 1999).

3. In order to benefit from the "relief by default" provisions, the grieved employee must raise the default issue as soon as the employee becomes aware of such default. Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 496 S.E.2d 447 (1997). Moreover, "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." Rhodes v. Randolph County Bd. of Educ., Docket No. 00-42-133D (Jan. 17, 2001); Lambert v. W. Va. Dep't of Health and Human Resources, Docket No. 99-HHR-326D (Oct. 14, 1999). *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).

4. Grievant did not meet her burden of proving by a preponderance of the evidence that a default occurred at level three.

Accordingly, Grievant's request that a default be entered is **DENIED** , and this matter is **DISMISSED** from the docket of the Grievance Board. This grievance is remanded to Level III, and Respondent is hereby **ORDERED** to schedule a level three hearing within five days of receipt of this order, or at a mutually agreeable date and time.

Date: October 28, 2003 _____

M. Paul Marteney

Administrative Law Judge

Footnote: 1

At the time this grievance was initiated, the Workers' Compensation Commission was part of the Bureau of Employment Programs. As of October 1, 2003, it is a separate entity.

Footnote: 2

Respondent included a voluminous document with its proposed findings, the August 5, 2003 investigation report, and requested it be marked as Respondent's Exhibit 30. As this report was available at the time of the hearing, but not offered into evidence at that time, when Grievant was available to cross-exam on its foundation or contents, it will not now be considered as evidence, and it is not admitted.